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Supreme Court, U.S.
F I L E D

No. 98 899 NOV 23 1998

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

GERALD FRANK PLUNK
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

GERALD FRANK PLUNK,
Defendant-Appellant.

No. 96-30363
D.C. No.
CR-94-00036-JWS
OPINION

Appeal from the United States District Court
for the District of Alaska
John W. Sedwick, District Judge, Presiding

Argued and Submitted
February 2, 1998—Seattle, Washington

Filed August 28, 1998

Before: James R. Browning, Otto R. Skopil, Jr., and Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge O'Scannlain

SUMMARY

Criminal Law and Procedure/Witnesses

The court of appeals affirmed a judgment of conviction. The court held that in a federal prosecution for controlled-substance crimes, an experienced narcotics officer may testify on the meaning of code words and jargon used by the defendant and his confederates in consummating drug transactions.

The Drug Enforcement Administration (DEA) issued an administrative subpoena to McCaw Communications requesting the telephone records of appellant Gerald Plunk. The subpoena was issued pursuant to 21 U.S.C. § 876(a), which gives the DEA broad powers to investigate violations of federal drug laws. The statute does not expressly provide a right to challenge the Attorney General's subpoena issued under it.

A federal indictment charged Plunk with conspiracy, maintaining a continuing criminal enterprise (CCE), using a communications facility in connection with a criminal drug operation, and possessing cocaine with intent to distribute. The district court denied Plunk's motion to suppress the telephone records the DEA obtained with the administrative subpoena.

During the government's case-in-chief, Detective Jerry Speziale testified as an expert generally on narcotics trafficking, wiretapping investigations, and the meaning of code words and jargon used by drug dealers. He also interpreted for the jury various encoded conversations between Plunk and his associates. Speziale also identified a voice tape recording as Plunk's.

The district court admitted tapes of wiretapped conversations between Plunk and his co-conspirators. The court repeatedly instructed the jury that the tapes were the evidence they should consider, and that transcripts furnished to them were to help in following the conversations, or in identifying the speakers.

Carlos Serrato, one of Plunk's associates, identified Plunk's voice on recordings of several telephone conversations played at trial, and had made a visual identification of Plunk at a photo lineup.

During deliberations, Dana Nichols, a court security officer, notified the court that Nichols had overheard a conversa-

tion in which Juror Mitchell expressed concern that the jury room and the evidence were not secure. Nichols had assured Mitchell that the jury room and the evidence were secure. After discussing the incident with counsel, the court told the jurors in a note that the tape recordings were secure and available, and that the jurors should not be concerned about the issue.

A short time later, the jury asked for a dictionary. In the absence of the judge, the judge's secretary authorized delivery of a dictionary to the jurors. However, the judge had the bailiff retrieve the dictionary before Juror Mitchell, who had wanted to look up "organizer" in connection with the CCE charge, could read the definition. No other juror had viewed the dictionary.

The jurors also asked to have some of the tapes replayed. Over defense objection, the court allowed the jury to audit the tapes and to have the benefit of the transcripts as guides.

On the third day of deliberations, the jurors notified the court that they had reached verdicts on seven counts, but were hung on the remaining three. The court consulted with the attorneys and gave a modified *Allen* charge to continue deliberating in an effort to reach a unanimous verdict, if that could be done without violating individual jurors' judgment and conscience. The court stated that jurors should not change an honest belief as to the evidence based solely on the opinions of other jurors, or merely for the purpose of reaching a verdict. A while later, the jurors announced that they could not reach a verdict as to three counts. The court then received their decision.

The jury found Plunk guilty of conspiracy, using a communications facility, and possession with intent to distribute. Plunk was acquitted on one count of possession with intent to distribute, and the jury hung on one count of conspiracy, one

CCE count, and one count of possession with intent to distribute.

At sentencing, co-conspirator Timothy Pierson testified that Plunk had perjured himself at Pierson's sentencing hearing regarding Pierson's knowledge of the presence of cocaine in delivery vehicles, and his participation in the conspiracy. Based in part on Pierson's testimony, the district court found that Plunk had obstructed justice and imposed a sentence enhancement on that ground.

On appeal, Plunk contended that the district court erred in allowing Detective Speziale to testify as an expert; denying his motion to suppress the fruits of the administrative subpoena; refusing to suppress the voice and photo identifications by Serrato and Speziale; allowing the jury to view the transcripts during deliberations; administering the *Allen* charge; and that the government violated its duty under *Brady v. Maryland* to search for and provide defense counsel with the notes contained in the files of the federal public defender; and that the Double Jeopardy Clause barred the government from prosecuting him because it had previously conducted civil forfeiture proceedings against items of his property.

[1] Speziale's testimony constituted specialized knowledge of law enforcement, not scientific knowledge. Courts evaluating the admissibility of "technical" or "specialized" knowledge like Speziale's determine whether the content of the proposed opinion constitutes a proper subject of expert testimony, and whether the witness possesses the requisite qualifications.

[2] Speziale's testimony concerned a proper subject of expert testimony. Law-enforcement officers with sufficient qualifications may testify concerning the methods and techniques employed in an area of criminal activity. The jargon of the narcotics trade and the codes that drug dealers use constitute specialized bodies of knowledge, and are therefore proper

subjects of expert opinion. [3] The district court was within the bounds of its discretion in qualifying Speziale as an expert and allowing him to testify as such regarding the codes and jargon of narcotics dealers.

[4] Under Fed. R. Evid. 704(b), experts are permitted to give their opinions regarding ultimate factual issues. [5] Rule 704(b) precludes expert testimony of an opinion or inference that the defendant did or did not have the requisite mens rea, and testimony of an opinion or inference which if true would compel the conclusion that the defendant did or did not have the requisite mens rea. Plunk pointed to nothing in Speziale's testimony that comprised an opinion that Plunk intended or knew anything in conjunction with the crimes charged. Nothing in the testimony necessarily compelled such an inference or conclusion.

[6] Plunk did not object to any of Speziale's testimony on the ground that the wiretap conversations were cumulative, confusing, or unduly prejudicial. [7] Before an appellate court may address and correct an error not raised at trial, there must be an "error" that is "plain," and that "affects substantial rights." If all three conditions are met, the court may notice a forfeited error if it seriously affects the fairness, integrity, or public reputation of judicial proceedings.

[8] The decoded words and phrases provided by Speziale's testimony carried tremendous probative value. Without them, the jury would have been incapable of comprehending the conspirators' exchanges. The evidence was not merely cumulative of the testimony that came before it. Nor in light of cautionary instructions to the jury was there any significant danger of undue prejudice to Plunk. It was not plain error for the district court to admit Speziale's interpretations.

[9] The subpoena was not directed at Plunk, but at a third-party business. Consequently, Plunk did not have standing to challenge its issuance under the Fourth Amendment unless he

demonstrated that he had a legitimate expectation of privacy attaching to the record obtained. Under longstanding precedent, individuals possess no reasonable expectation of privacy in telephone records. Plunk was also without statutory standing to attack the subpoena because he did not demonstrate that he was within the zone of interests protected by § 876(a).

[10] The Sixth Amendment does not grant the right to counsel at photographic displays conducted by the government for the purpose of allowing a witness to attempt an identification of the offender. Similarly, pretrial voice identifications are not, for Sixth Amendment purposes, critical stages of criminal proceedings. Plunk's Sixth Amendment argument was without merit.

[11] There is no per se rule of exclusion for unnecessarily suggestive identification techniques. If an identification procedure is impermissibly suggestive, the reviewing court must decide if the testimony is sufficiently reliable to be admitted. In gauging reliability, courts consult the totality of the circumstances, paying particular attention to: (1) the opportunity of the witness to observe the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation.

[12] Although the manner in which the government elicited Serrato's identification was perhaps not perfect, there was little reason to doubt the reliability of the identifications. In addition to the reasons set forth in the district court's ruling, Serrato testified that he had spoken to Plunk on 20 occasions during the course of the conspiracy, and had met with him several times. During neither the photographic nor the voice identification was Serrato told or led to believe that any person in any of the pictures, or on any of the tapes, was Plunk. There was no evidence that Serrato felt pressure to make a

positive identification. [13] Serrato's identifications were not elicited unconstitutionally.

[14] Fed. R. Evid. 901(a) governs the authentication of evidentiary records. [15] Rule 901(a) provides that authentication or identification is satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims. Rule 901(b) establishes a low threshold for voice identification offered to determine the admissibility of recorded conversations. So long as the identifying witness is minimally familiar with the voice, Rule 901(b) is satisfied. Speziale was present at Plunk's initial post-arrest interview. The familiarity that he gained through that exposure was sufficient under Rule 901(b)(5) to support his identification of Plunk's voice.

[16] To obtain a new trial, the defendant must establish that actual prejudice resulted from an ex parte contact with a juror. In assessing potential prejudice, the Ninth Circuit distinguishes substantive contact from the kind of technical assistance rendered by security officers in dealing with the physical needs of the jury. Officer Nichols's comment was innocuous. There was no reasonable probability that it affected the jury's deliberative process. Reversal was not required.

[17] Jurors have a duty to consider only the evidence that is presented in open court. However, there is no rule of automatic reversal for a juror's reception of extraneous information, irrespective of the nature of the information, or the manner in which it was received. Rather, when a jury obtains or uses evidence extrinsic to the trial record, a new trial is warranted only if there existed a reasonable possibility that the extrinsic material could have affected the verdict.

[18] Because none of the jurors in this case ever actually viewed the definition of the word "organizer," the extrinsic evidence was never actually considered, obtained, or used by

the jury. Consequently, there could have been no reasonable possibility that the evidence affected the jury's deliberations.

[19] The admission of transcripts as an aid in listening to tape recordings is a matter committed to the sound discretion of the trial court. **[20]** Standing alone, a defendant's claim that he has been erroneously identified as a speaker in a transcript of a recorded conversation does not constitute an allegation of inaccuracy sufficient to trigger close scrutiny of a decision to permit the jury to view the transcript. Rather, the challenge must run to the accuracy of the conversation itself. Plunk's transcript challenge failed.

[21] The district court's *Allen* instruction must be upheld unless it is clear that the charge had an impermissibly coercive effect on the jury. **[22]** In assessing coerciveness, courts inquire into (1) the form of the instruction; (2) the total time of deliberation and the time of deliberation following the instruction; and (3) any other indicia of coerciveness.

[23] The judge directed the jurors not to change an honest belief as to the evidence solely because of the opinions of fellow jurors, or for the purpose of returning a verdict. The duration of deliberations and the time that elapsed between the *Allen* charge and the verdict suggested the absence of coercion. **[24]** None of the other indicia of coercion were present. That the jury rendered a mixed verdict suggested that the jury reviewed the evidence rationally and independently. That the ratio of counts on which the jury reached verdicts to those on which it did not was seven to three, both before and after the charge, negated any inference of coercion. It was not clear from the record that the *Allen* charge had a coercive effect on the jury.

[25] Suppression by the prosecution of evidence favorable to an accused on request violates due process when the evidence is material to guilt or punishment. A prosecutor's *Brady* obligation extends to impeachment evidence. However, the

prosecution has no duty to volunteer information that it does not possess. The notes that Plunk sought were in the files of the federal public defender. Consequently, the prosecution did not possess or control the requested information, and was under no obligation to search for or provide the notes.

[26] Because Plunk did not assert any claim to the seized property, he was not "punished" when it was forfeited. Plunk was not forced to contest the civil forfeiture to protect his Fifth Amendment privilege in the pending criminal case. Thus, Plunk was not placed in jeopardy. The subsequent criminal prosecution was not barred by the Double Jeopardy Clause.

COUNSEL

Phillip Paul Weidner, Phillip Paul Weidner & Associates, Inc., Anchorage, Alaska, for the defendant-appellant.

Daniel S. Goodman, United States Department of Justice, Washington, D.C., for the plaintiff-appellee.

OPINION

O'SCANNLAIN, Circuit Judge:

We review challenges to convictions and a sentence on various counts which arose out of a coast-to-coast cocaine smuggling conspiracy.

I

During the late 1970s and the 1980s, Gerald Frank Plunk was a relatively small-time cocaine dealer in Anchorage, Alaska. He was supplied throughout the 1980s by Barry

Tendler, a pilot from Florida. Tendler, in turn, received his cocaine from a man named Michael. Michael was involved directly with Colombia's Cali Cartel, and had been entrusted with the responsibility of discovering a new way to smuggle cocaine into the United States. When told of Michael's charge, Plunk expressed his interest in participating. At Michael's behest, both Tendler and Plunk met him in Aruba in September 1992 to discuss possible smuggling arrangements. After a second Aruba rendezvous, Plunk was summoned to Colombia to meet personally with several high-ranking members of the Cali Cartel.

At the meeting in Colombia, Plunk was asked to coordinate the transportation of cocaine from Los Angeles and Houston to the New York City metropolitan area. He was placed in charge of a project that involved the cross-country transportation of cocaine in recreational vehicles. Plunk contacted and hired a number of drivers to move the cocaine across the country. Plunk's drivers successfully completed approximately eighteen drug runs, each of which resulted in the transportation of roughly 200 kilograms of cocaine.

Simultaneously with his motorhome project, Plunk and three of his co-conspirators coordinated the coast-to-coast transportation of cocaine inside produce trucks. The scheme entailed shipping the drugs inside vacuum-sealed bags, which were then placed inside crates of onions and other vegetables to avoid detection. Plunk successfully directed six or seven of these produce-truck hauls. On each occasion, the trucks carried between 200 and 250 kilograms of cocaine.

In December 1993, an independent narcotics investigation by New Jersey State Police uncovered $380,000 cash and a heat-sealing machine traceable to Plunk. A New York state court subsequently authorized a wiretap of several Colombians suspected of narcotics trafficking. Investigators concluded that the monitored telephone conversations suggested the existence of a large-scale conspiracy to transport cocaine

across the United States. They also discovered that a number of calls were placed from a number registered to Plunk. During a monitored conversation on December 10, Plunk mentioned that Hal Booher — one of his drivers, who was attempting to deliver a shipment of cocaine to New Jersey — would be replacing his Alaska license plates with Pennsylvania tags. That same day, a federal district court in Alaska authorized a tap of Plunk's cellular telephone. The agents determined that Plunk had called Booher at a number in Carlisle, Pennsylvania. The next day, the agents stopped Booher in New Jersey and questioned him. Booher consented to a search of the motorhome, which revealed 220 kilograms of cocaine. Booher implicated Plunk as his employer.

A subsequent search of Plunk's Alaska residence uncovered additional incriminating evidence, including several firearms, a scale, and nearly $10,000 in cash. Plunk surrendered himself to Drug Enforcement Administration ("DEA") authorities, and was arrested on March 25, 1994. A month later, Plunk was indicted in federal court on ten separate drug-related counts: two counts of conspiring to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 846; one count of maintaining a continuing criminal enterprise ("CCE") in violation of 21 U.S.C. § 848; four counts of using a communication facility in violation of 21 U.S.C. § 843(b); and three counts of possessing cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1).

A jury found Plunk guilty on one count of conspiracy, four counts of using a communication facility, and one count of possession with intent to distribute. It acquitted him on one count of possession with intent to distribute, and hung on one count of conspiracy, one count of CCE, and one count of possession with intent to distribute. Plunk was sentenced to life imprisonment.

Employing what might be described as a scatter-shot strategy, Plunk challenged his convictions and sentence on thir-

teen separate fronts. We address five of Plunk's claims in an unpublished disposition filed contemporaneously herewith. The balance of Plunk's arguments are as follows:

(1) the district court erred in permitting a veteran narcotics officer to testify as an expert regarding the meaning of certain code words and jargon used by Plunk and his co-conspirators in consummating drug transactions;

(2) the district court erred in denying his motion to suppress the fruits of an administrative subpoena;

(3) the district court erred in refusing to suppress voice and photographic identifications by a co-conspirator and a voice identification by a narcotics detective;

(4) the district court committed reversible error in refusing to grant a mistrial in the wake of a security officer's brief comment to a juror and the judge's secretary's decision to furnish the jury with a dictionary;

(5) the district court erred in allowing the jury to view transcripts of tape recorded conversations between Plunk and his co-conspirators during deliberations;

(6) the district court committed reversible error by administering an *Allen* charge;

(7) the government violated its obligations under *Brady v. Maryland* by failing to search for and to provide Plunk's counsel with handwritten notes allegedly contained in the files of the federal public defender; and

(8) the Double Jeopardy Clause barred the government from prosecuting him because it had previously conducted civil forfeiture proceedings against items of his property.

We have jurisdiction over Plunk's appeal pursuant to 28 U.S.C. § 1291. We address Plunk's contentions in turn.

II

During its case-in-chief, the government called Detective Jerry Speziale of the New York City Police Department to testify as an expert witness "in the field of narcotics trafficking, including wiretapping investigations, analysis of codes, words, and reference[s] used by narcotics traffickers." Speziale testified as to the general usage of cryptic terminology by drug dealers, and interpreted for the jury various encoded conversations between Plunk and his co-conspirators. On appeal, Plunk challenges the admission of Speziale's testimony under Federal Rules of Evidence 702, 704, and 403.

A

As a threshold matter, Plunk objects that Detective Speziale should not have been allowed to testify as an expert at all. Plunk contends that Detective Speziale's testimony was improperly admitted under the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), because it lacked the requisite "scientific basis." In *Daubert*, the Supreme Court concluded that Federal Rule of Evidence 702[1] had superseded the "general acceptance" test for novel scientific evidence, first articulated in *Frye v.*

[1]Rule 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Fed. R. Evid. 702.

United States, 293 F. 1013 (D.C. Cir. 1923). The *Daubert* Court held that in order to be admissible under Rule 702, scientific evidence had to be "derived by the scientific method" and of some assistance to the factfinder in determining a fact in issue. *See Daubert,* 509 U.S. at 590-93. The Court went on to suggest a few criteria to guide lower courts' decisions whether to admit scientific testimony: (1) whether the particular theory or technique could be tested; (2) whether the theory or technique presented had been subjected to peer review; (3) whether the theory or technique had a relatively low rate of error; and (4) whether the theory or technique had gained general acceptance in the relevant scientific community. *See id.* at 593-94.

[1] Plunk maintains that Speziale's allegedly expert knowledge of narcotics code terminology does not meet the *Daubert* standard and is, consequently, inadmissible. The unarticulated premise of Plunk's argument, however — that *Daubert* analysis applies to testimony such as that offered by Speziale — is incorrect. It is settled in this circuit that "*Daubert* is confined to the evaluation of 'scientific' expert testimony." *McKendall v. Crown Control Corp.,* 122 F.3d 803, 806 (9th Cir. 1997). Consequently, because Speziale's testimony "constitutes specialized knowledge of law enforcement, not scientific knowledge, the *Daubert* standards for admission simply do not apply." *United States v. Webb,* 115 F.3d 711, 716 (9th Cir.), *cert. denied,* 118 S. Ct. 429 (1997); *accord United States v. Cordoba,* 104 F.3d 225, 230 (9th Cir. 1997).[2] Rather, courts evaluating the admissibility of "technical" or "specialized" knowledge such as Speziale's must conduct a more traditional Rule 702 analysis and determine, first, whether or not the content of the proposed opinion constitutes

[2]Our interpretation of *Daubert* is consistent with the Supreme Court's own characterization of its decision. *See Daubert,* 509 U.S. at 590 n.8 ("Rule 702 also applies to 'technical, or other specialized knowledge.' Our discussion is limited to the scientific context because that is the nature of the expertise offered here.").

a proper subject of expert testimony (*i.e.*, "technical[ ] or other specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue," Fed. R. Evid. 702), and second, whether or not the proposed witness possesses the requisite qualifications (*i.e.*, "knowledge, skill, experience, training, or education," *id.*) in his claimed area of expertise. *See McKendall*, 122 F.3d at 806.

[2] We cannot doubt that Detective Speziale's testimony concerned a proper subject of expert testimony. Ninth Circuit precedent makes clear that, as a general proposition, "[l]aw enforcement officers with sufficient qualifications may testify concerning the methods and techniques employed in an area of criminal activity." *United States v. Espinosa*, 827 F.2d 604, 612 (9th Cir. 1987); *accord United States v. Kearns*, 61 F.3d 1422, 1427 (9th Cir. 1995). More specifically, the jargon of the narcotics trade and the codes that drug dealers often use constitute specialized bodies of knowledge — certainly beyond the ken of the average juror — and are therefore proper subjects of expert opinion. *See United States v. Griffith*, 118 F.3d 318, 321 (5th Cir. 1997); *United States v. Delpit*, 94 F.3d 1134, 1145 (8th Cir. 1996); *United States v. Quintana*, 70 F.3d 1167, 1170-71 (10th Cir. 1995); *United States v. Boissoneault*, 926 F.2d 230, 232 (2d Cir. 1991); *United States v. Rollins*, 862 F.2d 1282, 1292 (7th Cir. 1988); *United States v. Hoffman*, 832 F.2d 1299, 1310 (1st Cir. 1987).

With regard to Detective Speziale's qualifications, the district court concluded that Speziale was "qualified based upon his experience and training . . . and he can testify . . . with specialized knowledge of how drug trafficking is sometimes conducted and speak to the methods and techniques that may be employed." The court based its ruling, *inter alia*, on evidence that Speziale (1) possessed extensive experience working undercover in large-scale drug trafficking organizations, (2) had served as an instructor to the FBI and the DEA on wiretap techniques, and (3) had listened to more than 350

wiretaps in which narcotics traffickers were communicating using codes and other jargon. Although Plunk's attorney sought to make much on voir dire of the fact that Speziale had no formal training in the use of drug-culture code, we are not persuaded. "[H]ard-core drug trafficking scarcely lends itself to ivied halls. In a rough-and-ready field such as this, experience is likely the best teacher." *Hoffman*, 832 F.2d at 1310.

[3] The district court was well within the bounds of its discretion in qualifying Detective Speziale as an expert and allowing him to testify as such regarding the cryptic codes and jargon of narcotics dealers.

B

Plunk next contends that Detective Speziale should not have been allowed to provide his expert opinion as to the meanings of code words contained in recordings of wiretapped telephone conversations between Plunk and his associates. Speziale testified, for example, that the intercepted phrases, "How hungry is Panchito? Would he like to have breakfast?" meant "that Pancho could meet in the morning to be loaded with the cocaine." According to Speziale, Plunk's recorded statement that "maybe I can take some documents with me" meant that Plunk hoped to bring home money from a Los Angeles meeting. Plunk argues that such testimony violated Federal Rule of Evidence 704.

[4] Under Rule 704(a), experts are permitted to give their opinions regarding ultimate factual issues. *See* Fed. R. Evid. 704(a). Rule 704(b) creates an exception, providing that "[n]o expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto." Fed. R. Evid. 704(b). We addressed the scope of this exception in *United States v. Morales*, 108 F.3d 1031 (9th Cir. 1997) (en banc).

Although other circuits have suggested that the rule applies only to psychiatrists and other mental health professionals, the *Morales* court rejected that narrow interpretation, concluding that 704(b) "extends to all expert witnesses." 108 F.3d at 1036. Thus, the rule applies to Detective Speziale. We disagree, however, with Plunk's contention that Speziale's testimony violated Rule 704(b).

[5] Under *Morales*, Rule 704(b) "only precludes expert testimony of an opinion or inference that the defendant did or did not have the requisite *mens rea* and testimony of an opinion or inference which if true would compel the conclusion that the defendant did or did not have the requisite *mens rea*." *Id.* at 1041. Plunk has pointed to nothing in Speziale's testimony that comprises an explicit opinion that Plunk intended or knew anything in conjunction with the crimes charged. Likewise, nothing in the testimony necessarily compels such an inference or conclusion. *See id.* at 1037. Speziale offered his opinion about the meaning of drug jargon in encrypted exchanges between the conspirators, allowing the jurors to determine for themselves the legal significance of the conversations as interpreted. *See, e.g., United States v. Simmons*, 923 F.2d 934, 947 (2d Cir. 1991) ("[The agent's] testimony, which related only to the meaning of unfamiliar narcotics jargon, left to the jury the task of determining whether the decoded terms demonstrated the necessary criminal intent.").

Plunk argues that this court in *United States v. Bailey*, 607 F.2d 237, 240 (9th Cir. 1979), approved an expert's testimony interpreting terminology commonly used by narcotics dealers, but disallowed questions "as to specific alleged code words used by [the] defendants." Plunk's reliance on *Bailey* is misplaced. The *Bailey* court did not disallow testimony about specific words used by the defendants in that case; the court simply noted that the trial judge had excluded such testimony. *See id.* In fact, this court commented on the prosecutor's proposal — rejected at trial — to question the expert "as to the meaning of words used in . . . individual conversations," cau-

tioning that "[w]e express no view as to whether the prosecution's proposed procedure would have been proper." *Id.* at 240 n.8.

Bailey does not stand for the proposition that experts testifying about drug jargon may not explain the meanings of specific code words. Under Rule 704(b), the issue is not whether Detective Speziale's testimony included his expert opinion about code words used specifically by Plunk and his associates; rather, the issue is whether the testimony constituted "an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged." Fed. R. Evid. 704(b). We hold that it did not.

C

[6] Finally, with regard to Detective Speziale's expert testimony, Plunk contends on appeal that the district court should have excluded the evidence under Federal Rule of Evidence 403[3] because its probative value was substantially outweighed by its prejudicial effect. A review of the record, however, reveals that, despite his many other objections,[4] Plunk did not object to any of Speziale's testimony on Rule 403 grounds in the district court. He never complained to the trial judge that the evidence regarding the wiretap conversations was cumulative, confusing, or unduly prejudicial. Because Plunk failed to make a Rule 403 objection in the trial court, we review the admission of the testimony under that Rule only for plain

[3]Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403.

[4]During the course of Speziale's direct examination, Plunk's counsel objected, *inter alia*, on the following grounds: hearsay, confrontation, improper opinion as to mental state, relevance, vagueness, speculation, foundation, leading questions, and nonresponsiveness.

error. *See* Fed. R. Crim. P. 52(b);[5] Fed. R. Evid. 103(d);[6] *United States v. Gomez-Norena,* 908 F.2d 497, 499-500 (9th Cir. 1990).

[7] According to the Supreme Court's most recent articulation of the plain error standard, before an appellate court may address and correct an error not raised at trial, several conditions must be satisfied:

> [T]here must be (1) "error," (2) that is "plain," and (3) that "affect[s] substantial rights." If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings."

Johnson v. United States, 117 S. Ct. 1544, 1549 (1997) (quoting *United States v. Olano,* 507 U.S. 725, 732 (1993)) (citations and internal quotation marks omitted).

[8] The decoded words and phrases provided by Speziale's testimony carried tremendous probative value; without them, the jury would have been completely incapable of comprehending the conspirators' exchanges. The evidence was not merely cumulative of testimony that had come before it. Nor, in light of the district court's repeated cautionary instructions to the jury that it could assign Speziale's testimony whatever value it wished, was there any significant danger of unfair prejudice to Plunk. Consequently, it was not plain error for

[5]Rule 52(b) provides: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

[6]Rule 103(d) provides: "Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court."

the district court to admit Speziale's interpretations of the conspirators' encoded conversations.[7]

D

In sum, each of Plunk's challenges to the admission of Detective Speziale's code-interpretation testimony fails. The district court did not abuse its discretion in permitting the evidence.

III

In December 1993, the DEA regional office in Anchorage issued an administrative subpoena to McCaw Communications requesting Plunk's telephone records. The subpoena was issued pursuant to 21 U.S.C. § 876(a), which provides, in relevant part:

> In any investigation relating to his functions under this subchapter with respect to controlled substances . . . the Attorney General may subpena (sic) witnesses, compel the attendance and testimony of witnesses, and require the production of any records (including books, papers, documents, and other tangible things which constitute or contain evidence) which the Attorney General finds relevant or material to the investigation. The attendance of witnesses and the production of records may be required from any place in any State or in any territory or other place subject to the jurisdiction of the United States at any designated place of hearing.

[7]Indeed, in view of the inherently fact-specific nature of the Rule 403 balancing inquiry, and the special deference to which district courts' decisions to admit evidence pursuant to that Rule are entitled, *see, e.g. Borunda v. Richmond*, 885 F.2d 1384, 1388 (9th Cir. 1988); *United States v. Layton*, 767 F.2d 549, 554 (9th Cir. 1985), it is the rare exception when a district court's decision to admit evidence under Rule 403 constitutes plain error.

21 U.S.C. § 876(a).

[9] On appeal, Plunk argues that the "plain meaning" of § 876(a) precludes the production of documents except in conjunction with an agency hearing. We need not pronounce judgment upon Plunk's novel interpretation of § 876(a), however, because Plunk lacks standing to challenge the issuance of the subpoena. The subpoena was "not directed at [Plunk], but rather at third party businesses"; consequently, Plunk does not have the requisite standing to challenge its issuance under the Fourth Amendment "unless he [can] demonstrate that he had a legitimate expectation of privacy attaching to the records obtained." *United States v. Phibbs,* 999 F.2d 1053, 1077 (6th Cir. 1993). Under longstanding Ninth Circuit precedent, individuals possess no reasonable expectation of privacy in telephone records. *See, e.g., United States v. Lustig,* 555 F.2d 737, 747 n.10 (9th Cir. 1977). Plunk is thus without Fourth Amendment standing to challenge the subpoena. Nor does Plunk possess statutory standing to attack the subpoena, because he has not demonstrated that he was within the "zone of interests" intended to be protected by § 876(a). *See United States v. Moffett,* 84 F.3d 1291, 1293 (10th Cir. 1996). Section 876 was "written to give the DEA broad powers to investigate violations of federal drug laws" and "provides no express right to challenge the Attorney General's subpoenas issued under it." *Id.*

IV

Plunk also challenges the identification testimony of two government witnesses. Carlos Serrato, one of Plunk's co-conspirators, identified Plunk's voice on recordings of several phone conversations played at trial and made a visual identification of Plunk in reliance on what Plunk terms a "highly suggestive" photographic lineup. Detective Speziale also identified a voice on tape recordings admitted into evidence as being Plunk's. We consider their identifications in turn.

A

1

[10] Plunk first argues, as a threshold matter, that Serrato's out-of-court photo and voice identifications, which were conducted well after his indictment, were "critical stages" of the criminal prosecution, and were conducted outside the presence of counsel in violation of *United States v. Wade*, 388 U.S. 218 (1967). Plunk, however, ignores controlling post-*Wade* precedent. In *United States v. Ash*, 413 U.S. 300 (1973), the Supreme Court carefully circumscribed its decision in *Wade*: "[T]he Sixth Amendment does not grant the right to counsel at photographic displays conducted by the Government for the purpose of allowing a witness to attempt an identification of the offender." *See id.* at 321; *accord United States v. Barker*, 988 F.2d 77, 78 (9th Cir. 1993). Similarly, following *Ash*, this court held that pretrial voice identifications "are not, for Sixth Amendment purposes, critical stages of the criminal proceeding." *United States v. Kim*, 577 F.2d 473, 481 (9th Cir. 1978). Plunk's Sixth Amendment "right to counsel" argument is thus without merit.

2

Plunk also contends that Serrato's photographic and voice identifications were conducted in an impermissibly suggestive manner, thus contravening the Due Process Clause of the Fifth Amendment. Specifically, with regard to the voice identification, Plunk complains that the taped exemplar from which Serrato first identified Plunk's voice was prefaced by a female voice saying, "You're looking for Frank?" Serrato, however, denied being influenced by the woman's remark; rather, he testified that he was able accurately to identify Plunk's voice because he had "spoken to him on numerous occasions" and because he recognized both the tone and the pattern of Plunk's speech.

With respect to the photographic identification, Plunk contends on appeal that his "photograph was presented with his name on it, amidst 5 other photographs, one of which was Mr. Serrato himself, and the others were either Colombians known to him or otherwise labeled." Plunk's characterization of the photographic lineup, however, is not entirely accurate. It is true that Serrato was shown approximately six photographs and that three of the photographs depicted men with whom he was familiar; Serrato, however, did not recognize the individuals depicted in two photographs. He identified Plunk in the sixth photograph. Plunk's reference to the fact that his picture was presented to Serrato "with his name on it" is similarly misleading. Although Plunk's name was on the photograph, it was on the *back side* of the print — a side not shown to Serrato during the identification.

[11] Our task in evaluating the constitutionality of the identification techniques is simplified by the fact that photographic and voice identifications are governed by "essentially the same" constitutional standards. *United States v. Pheaster*, 544 F.2d 353, 369-70 (9th Cir. 1976). Even if we assume, for the purposes of decision, that the identification procedures were unnecessarily suggestive, that assumption does not end the inquiry. There simply is no per se rule of exclusion for unnecessarily suggestive identification techniques. *See Manson v. Brathwaite*, 432 U.S. 98, 109-14 (1977); *see also United States v. Kessler*, 692 F.2d 584, 586 (9th Cir. 1982) ("[A]t least some level of suggestibility is legitimate."). If an identification procedure is impermissibly suggestive, the reviewing court must decide "if the identification testimony . . . is nonetheless sufficiently reliable to be admitted into evidence." *United States v. Nash*, 946 F.2d 679, 681 (9th Cir. 1991); *see also Brathwaite*, 432 U.S. at 114 ("[R]eliability is the linchpin in determining the admissibility of identification testimony."). In gauging reliability, we must consult the totality of the circumstances, paying particular attention to the five factors articulated in *Neil v. Biggers*, 409 U.S. 188 (1972):

(1) the opportunity of the witness to observe the criminal at the time of the crime;

(2) the witness's degree of attention;

(3) the accuracy of the witness's prior description of the criminal;

(4) the level of certainty demonstrated by the witness at the confrontation; and

(5) the length of time between the crime and the confrontation.

See id. at 199-200.[8] An out-of-court identification is admissible, along with the resulting in-court testimony, "if factors indicating reliability outweigh the effect of the suggestive presentation" of the photographs or voice exemplars. *United States v. Wang*, 49 F.3d 502, 505 (9th Cir. 1995).

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[8]Citing *United States v. Field*, 625 F.2d 862, 866 (9th Cir. 1980), Plunk contends that reviewing courts must also take into consideration two other factors, in addition to those catalogued by the Supreme Court in *Biggers*: (1) the presence and influence of other witnesses at the time of the prior identification and (2) any conduct on the part of the government agents tending to focus the witness's attention on the defendant. It would appear, however, that the additional factors Plunk references — which were originally articulated in *Parker v. Swenson*, 332 F. Supp. 1225, 1230-31 (E.D. Mo. 1971), and adopted by the Ninth Circuit in *United States v. Crawford*, 576 F.2d 794 (9th Cir. 1978) — are victims of constitutional desuetude. The most recent Ninth Circuit decision to reference those factors was issued in 1983, *see United States v. Burnette*, 698 F.2d 1038 (9th Cir. 1983), and even that case spoke of them in the past tense. *See id.* at 1045 n.11 ("We formerly employed a somewhat different standard.") On the contrary, the Ninth Circuit cases evaluating out-of-court identifications exclusively under *Biggers* are legion. *See, e.g., United States v. Jones*, 84 F.3d 1206, 1209-10 (9th Cir.), *cert. denied*, 117 S. Ct. 405 (1996); *United States v. Matta-Ballesteros*, 71 F.3d 754, 769 (9th Cir. 1995), *modified*, 98 F.3d 1100 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 965 (1997); *United States v. Dring*, 930 F.2d 687, 692-93 (9th Cir. 1991). Consequently, we reject Plunk's claim that the *Biggers* factors do not control our decision.

In this case, the district court examined and applied the *Biggers* factors methodically and thoroughly (with the exception of the third, which it found "hard to apply" because there was no "prior description" in the record). First, it found that through their common criminal dealings, "Mr. Serrato had a substantial opportunity to view . . . Frank Plunk." Second, it concluded that Serrato was "both smart and observant," and that, particularly in light of the illegal nature of his activity, he would have "paid close attention to the people [including Plunk] he was dealing with." With regard to the fourth factor, the district court determined that "based on Mr. Serrato's testimony . . . I think he was very certain that . . . the man in the photograph was Mr. Plunk." Finally, the court concluded that the length of time that had elapsed since the crime, although not insignificant, was less than the seven months that the Supreme Court approved in *Biggers*.[9] The district court therefore concluded that the photographic identification was reliable, and thus admissible. The district court also held that "for essentially the same reasons, I'm going to allow [Serrato] to identify the voices on the tape."

[12] Although the manner in which the government elicited Serrato's identifications was perhaps not perfect, there is little reason to doubt the reliability of those identifications. In addition to the reasons set forth in the district court's ruling, Serrato testified that, during the course of the conspiracy, he had spoken to Plunk on twenty separate occasions — "not only on the phone, but also speaking directly to him" — and had met with him in person several times. Moreover, during neither the photographic nor the voice identification was Serrato "told or led to believe that any person in any of the pictures [or on any of the tapes] . . . was [Plunk]," even after he had made the identification. *United States v. Matta-Ballesteros*, 71 F.3d 754, 769 (9th Cir. 1995), *modified*, 98 F.3d 1100 (9th Cir.

[9]It is also worthy of note with regard to the fifth *Biggers* factor that this court, in *Matta-Ballesteros*, 71 F.3d 754, approved a six-year gap between initial observation and in-court identification. *See id.* at 770.

1996), *cert. denied,* 117 S. Ct. 965 (1997). Finally, there is no evidence in the record that Serrato "felt pressure to make a positive identification." *United States v. Dring,* 930 F.2d 687, 693 (9th Cir. 1991).

[13] For these reasons, as well as those ably articulated by the district court, we hold that Serrato's photographic and voice identifications were not elicited unconstitutionally.

B

Plunk also challenges Detective Speziale's in-court identification of his voice on tape-recorded telephone conversations that were introduced into evidence. Speziale's identification should not have been admitted, Plunk contends, because "[n]o demonstration of [Speziale's] familiarity with Mr. Plunk's voice or voice on tape was offered." Had Plunk objected to Speziale's identification at trial and the district court ruled on his objection, we would review the evidentiary ruling for abuse of discretion. *See United States v. Duran,* 4 F.3d 800, 802-03 (9th Cir. 1993). Plunk, however, did not object to the admission of Speziale's identification testimony at trial; in fact, Plunk's counsel stated that, although he preferred that Speziale not point at Plunk from the witness stand, he "ha[d] no problem with [Speziale] identifying Mr. Plunk." Consequently, we review only for plain error. As discussed earlier, under the plain error standard, before relief may be granted, Plunk must demonstrate (1) that there was "error," (2) that the error was "plain," (3) that the error "affect[s] substantial rights," and (4) that the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Johnson,* 117 S. Ct. at 1549. Plunk's objection to Speziale's voice identification cannot survive even the first prong of the *Johnson* standard, because the district court's admission of the identification was not erroneous.

[14] The nature of Plunk's challenge to Speziale's in-court identification testimony is somewhat different from his objec-

tions to Serrato's out-of-court identifications. With respect to Speziale's testimony, it was the tape recording itself — and not Speziale's identification of the voice on the tape — that was offered as evidence. Consequently, whereas Plunk attacked Serrato's photographic and voice identifications (which were themselves offered as evidence) under the Due Process Clause as being unduly suggestive, his challenge to Speziale's testimony is premised upon Federal Rule of Evidence 901, which governs the authentication and identification of evidentiary records.

[15] Rule 901(a) provides generally that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Fed. R. Evid. 901(a). Rule 901(b)(5) states a more specific rule applicable to voice identifications: It is sufficient that there be an "[i]dentification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker." Fed. R. Evid. 901(b)(5). Rule 901(b)(5) establishes a low threshold for voice identifications offered to determine the admissibility of recorded conversations. So long as the identifying witness is "minimally familiar with the voice he identifies," Rule 901(b) is satisfied. *See United States v. Cerone*, 830 F.2d 938, 949 (8th Cir. 1987); *United States v. Cuesta*, 597 F.2d 903, 915 (5th Cir. 1979). The record reveals that Speziale was present in Anchorage at Plunk's initial post-arrest interview. The familiarity that he gained through that exposure was sufficient under Rule 901(b)(5) to support his identification of Plunk's voice on the tape recorded conversations being offered into evidence.

V

Plunk next maintains that the jury that convicted him was contaminated by two separate incidents of alleged miscon-

duct: (1) a security officer's brief comment to one of the jurors, and (2) the provision of a dictionary to members of the jury during deliberations. We examine each in turn.

A

On the morning of the third day of jury deliberations, Judge Sedwick received a note from a court security officer, Dana Nichols, indicating that Nichols had overheard a conversation between one of the jurors, Richard Mitchell, and the jury clerk. According to Officer Nichols, Mitchell had expressed a "concern" that the jury room was not secure. In response, Officer Nichols had attempted to reassure Mitchell: "[T]he jury room and evidence is all secure and that is our discretion over securing the items for the Court." After discussing the incident with counsel, the trial judge drafted a short note to the jury, in which both attorneys assented:

> To the jury: It has come to the attention of the Court that one or more jurors may be concerned that because I ordered the Clerk to retain the tape recordings which are exhibits after the replay of some tapes, that this somehow may create a problem. It does not. The tapes remain secure and available. You should not concern yourselves further about this issue.

Tr. 15:5.

[16] On appeal, Plunk contends that Officer Nichols's brief comment to juror Mitchell that "[t]he jury room and evidence is all secure" constitutes reversible error. Pursuant to Ninth Circuit precedent, however, "[t]o obtain a new trial, the defendant must establish that actual prejudice resulted from an ex parte contact with a juror." *United States v. English*, 92 F.3d 909, 913 (9th Cir. 1996). Plunk has alleged no specific prejudice resulting from Nichols's communication with Mitchell. Nor can we imagine how any would have arisen, given the

decidedly non-substantive nature of Nichols's remark.[10] In assessing potential prejudice, this court has previously distinguished substantive contact from "the kind of technical assistance rendered by [security officers] in dealing with the physical needs of the jury." *United States v. Kupau*, 781 F.2d 740, 743 (9th Cir. 1986); *see also Lee v. Marshall*, 42 F.3d 1296, 1298-99 (9th Cir. 1994) (finding "no hint of prejudice" in a brief discussion between jury members and police officers regarding the repair of a VCR, despite the fact that it was "most likely" the district attorney who had instructed the officers to enter the jury room). Officer Nichols's comment was innocuous. There is no reasonable probability that it affected the jury's deliberative process; consequently, reversal is not required.

B

Shortly after Judge Sedwick had resolved the issue regarding Officer Nichols, the jury sent a note requesting a dictionary. Judge Sedwick, who was on the bench in another matter, had instructed the court clerk that "if the jury requests things like pens or pencils or paper to write on, she could just give them . . . to the jury." When the clerk received the dictionary request, she called Judge Sedwick's secretary, who authorized delivery of the dictionary to the jury room. The secretary then contacted Judge Sedwick, who corrected her, saying "No, that's not appropriate. Stop the delivery of the dictionary." The bailiff immediately retrieved the dictionary from the jury room.

Judge Sedwick interviewed the jurors regarding the incident. According to two jurors' reports, the jury had possession of the book for no more than one or two minutes. Juror Mitch-

[10]This case is worlds away, for instance, from *Parker v. Gladden*, 385 U.S. 363 (1966), in which a bailiff in charge of a sequestered jury stated to a juror, in front of the entire panel, "Oh that wicked fellow, he is guilty," *id.* at 363.

ell, who had requested the dictionary, informed the judge that he had opened the book, and that he had intended to look up the word "organizer,"[11] but that he had been unable to read the definition before the bailiff demanded the return of the dictionary. No other jurors viewed the dictionary. After speaking with the jury, Judge Sedwick specifically instructed the jury that it could not consult the dictionary. He then concluded:

> There's nothing I can do about what has happened. I have satisfied myself that no harm was done, that the deliberations have not been imperiled by the importation into them of something extraneous to the evidence.

Tr. 15:34. Judge Sedwick's own characterization of the incident's impact on the trial is significant, because, although we review alleged incidents of juror misconduct independently, we must accord special deference to the trial judge's impression of the impact of the evidence:

> The trial judge is uniquely qualified to appraise the probable effect of information on the jury, the materiality of the extraneous material, and its prejudicial nature. He or she observes the jurors throughout the trial, is aware of the defenses asserted, and has heard the evidence. The judge's conclusion about the effect of alleged juror misconduct deserves substantial weight.

United States v. Bagnariol, 665 F.2d 877, 885 (9th Cir. 1981).

Plunk now contends that the jury's exposure to the dictionary constitutes reversible error. Because the jury was

[11]In order to convict Plunk on the CCE count, the prosecution had to demonstrate, among other things, that Plunk "occupie[d] a position of *organizer*, a supervisory position, or any other position of management . . . ." 21 U.S.C. § 848(c)(2)(A) (emphasis added).

instructed on the CCE count that it must find as an element of the crime that "the defendant acted as an *organizer,* supervisor or manager of the five or more persons," Plunk complains that "providing the dictionary . . . violated [his] right to equal protection and due process[,] to effective assistance of counsel, to a jury trial, and to protections of a judge in so far as numerous uncensored and inappropriate instructions were undoubtedly read by the jurors."

[17] It cannot be doubted that "[j]urors have a duty to consider only the evidence which is presented to them in open court." *Bayramoglu v. Estelle,* 806 F.2d 880, 887 (9th Cir. 1986). However, there is no rule of automatic reversal for a juror's reception of extraneous information, irrespective of the nature of the information or the manner in which it is received. *See United States v. Steele,* 785 F.2d 743, 745-46 (9th Cir. 1986). Indeed, "not every incident of juror misconduct or bias [even] requires a new trial." *United States v. Hendrix,* 549 F.2d 1225, 1229 (9th Cir. 1977). Rather, whenever a jury "obtains or uses" evidence extrinsic to the trial record, a new trial is warranted only "if there existed a reasonable possibility that the extrinsic material could have affected the verdict." *Marino v. Vasquez,* 812 F.2d 499, 504 (9th Cir. 1987) (quoting *United States v. Vasquez,* 597 F.2d 192, 193 (9th Cir. 1979)) (internal quotation marks omitted).

[18] In several cases, we have suggested that courts reviewing juror-misconduct appeals involving extrinsic evidence should consider five separate factors to determine the probability of prejudice: "(1) whether the extrinsic material was actually received, and if so, how; (2) the length of time it was available to the jury; (3) the extent to which the jury discussed and considered it; (4) whether the extrinsic material was introduced before a verdict was reached, and if so, at what point in the deliberations it was introduced; and (5) any other matters which may bear on the issue of the reasonable possibility of whether the introduction of extrinsic material affected the verdict." *E.g., United States v. Navarro-Garcia,* 926 F.2d 818,

822-23 (9th Cir. 1991) (internal quotation marks omitted). This case, however, is different. Because none of the jurors in the instant case ever actually viewed the definition of the word "organizer," the extrinsic evidence (which was the definition itself, and not the dictionary) was never actually "considered," *see Bayramoglu*, 806 F.2d at 887, or "obtain[ed] or use[d]," *see Marino*, 812 F.2d at 504, by the jury.[12] Consequently, by definition, there could be no "reasonable possibility" that the evidence affected the jury's deliberations.

Even if we were to apply the five-part standard, reversal would still be unwarranted. Although the fourth factor might weigh marginally in favor of a finding that the evidence could have impacted deliberations because the dictionary was introduced prior to the verdict being reached, the first, second, and third factors all counsel the opposite conclusion. First, and most importantly, as alluded to above, the definition was never read, and hence was never "received" by the jury. Second, this is not a case like *Steele*, 785 F.2d 743, in which the jury had possession of the dictionary for at least two hours, *see id.* at 745; here, by contrast, even the most liberal estimates place the dictionary in the jury room for only two minutes. Third, and again unlike *Steele*, the definition of "organizer" was not read aloud, and there was no general discussion of the term's meaning.[13] A final consideration weighing against a finding of reversible error — a consideration that fits within *Navarro-Garcia*'s fifth, catch-all factor — is the "substantial weight" that we must give to the district court's own conclusion that "no harm was done, [and] that the deliberations [were not] imperiled."

[12]At the risk of belaboring the obvious, we pause to emphasize that when a defendant challenges a juror's reception of extrinsic information, he must, as a threshold matter, make a showing that the juror actually received — *i.e.*, either saw or heard — the information.

[13]It is certainly worth noting that the *Steele* court, which had before it a much closer case than this, concluded that there was "no reasonable possibility that the jury's unauthorized use of the dictionary affected the verdict." *See Steele*, 785 F.2d at 749.

C

In sum, we hold that there is no "reasonable possibility" that either Officer Nichols's reassuring comment to juror Mitchell or the brief presence in the jury room of a dictionary materially affected the verdict. Consequently, the incidents do not warrant reversal of Plunk's convictions.

VI

Early in the trial, the district court admitted into evidence a number of tapes of wiretapped conversations between Plunk and his co-conspirators. When the government first sought to play one of the tapes for the jury and to distribute a transcript to accompany the recording, Judge Sedwick carefully instructed the jury as to the appropriate use of the transcripts:

> Ladies and gentlemen, tape recordings of conversations have been received in evidence . . . . A typewritten transcript of the tape recorded conversation is furnished to you for your convenience in assisting you in following the conversation or in identifying the speakers.
>
> . . . It is the tape and not the transcript that is the evidence. Where the conversations are in a language other than English, you'll have to rely on the transcripts and make your decision based upon those. But I emphasize that where the conversation is in English, it is the conversation on the tape that is the evidence, not the transcript.

Tr. 2:57-58. Judge Sedwick repeated his cautionary instruction to the jury each time one of the tapes was played.

During deliberations, the jury sent a note to Judge Sedwick requesting to have several tapes replayed. After some discussion with counsel, and over an objection by Plunk's attorney,

Judge Sedwick decided that the jury would be permitted to hear the tapes once again, and would have the benefit — as it did during the trial — of using the transcripts as guides. Judge Sedwick reassured Plunk's attorney, however, that "the jury [was] going to be told in no uncertain terms . . . that transcripts are not evidence." Judge Sedwick summoned the jurors from the jury room into the courtroom to listen to the tapes. Before playing the requested tapes for the jurors, Judge Sedwick carefully instructed them as he had before:

> . . . The transcripts are available to you if you choose to use them. Let me emphasize that it is what is on the tapes that is evidence. The transcripts are not evidence. They're provided for your assistance. But what you hear on the tapes is the evidence. The transcripts are most assuredly not evidence.

Tr. 14:25-26.

On appeal, Plunk contends — without citation to authority —that Judge Sedwick's decision to allow the jury access to the transcripts during deliberations "violated [Plunk's] right to due process, confrontation, counsel, and to a jury trial." We review the district court's decision to allow the jury to view written transcripts during deliberations only for abuse of discretion. *See United States v. Taghipour,* 964 F.2d 908, 910 (9th Cir. 1992).

[19] It is well established in this circuit that the admission of typewritten transcripts "as an aid in listening to tape recordings . . . is a matter committed to the sound discretion of the trial court." *United States v. Turner,* 528 F.2d 143, 167-68 (9th Cir. 1975). A number of considerations convince us that there was no abuse of discretion here. First, when the transcripts were initially distributed, Judge Sedwick admonished the jury to keep them face down until the tape began to play: "Ladies and gentlemen, don't start looking through those books just yet. Just pass them out, please." Second, the

transcripts themselves were never received into evidence. Third, Judge Sedwick clearly and repeatedly instructed the jury that it was to consider the tapes, and not the transcripts, as substantive evidence. Finally, the parties expressly stipulated that "[i]f called to testify, each [transcript] monitor would identify the conversation they monitored and would testify that the recordings being offered in court are authentic and accurate and complete reproductions of the conversations overheard, monitored and recorded by said monitor." *See United States v. Booker*, 952 F.2d 247, 250 (9th Cir. 1991).

[20] It is also significant that Plunk's attorneys have not pointed to any "substantial[ ] innacura[cies]" in the transcripts. *United States v. Pena-Espinoza*, 47 F.3d 356, 360 (9th Cir. 1995). In fact, the parties expressly stipulated to the fact that "these conversations were reviewed by certified language specialists or Special Agents, employed by the Drug Enforcement Administration, who then prepared to the best of their abilities, complete written or typed verbatim transcripts of these conversations in the English language." Plunk, of course, maintains that he did raise an issue as to the accuracy of the transcripts by arguing that "the use of [his] name over 140 times on the transcript as a speaker was inaccurate and prejudicial." Standing alone, however, a defendant's claim that he has been erroneously identified as a speaker in a transcript of a recorded conversation does not constitute an allegation of "inaccuracy" sufficient to trigger close scrutiny of a district judge's decision to permit the jury to view the transcript; rather, his challenge must run to the substantive accuracy of the conversation itself. *See United States v. Ulerio*, 859 F.2d 1144, 1145-46 (2d Cir. 1988) (cited with approval in *Taghipour*, 964 F.2d 908). "[W]here no issue as to accuracy is raised, it is not an abuse of discretion for a trial judge to allow the transcripts into the jury room." *Taghipour*, 964 F.2d at 910. As a result, Plunk's transcripts-based challenge must fail.

VII

Shortly before noon on the third day of deliberations, the jury sent a note to Judge Sedwick. The note read: "We, the jury, have reached verdicts on seven counts. We are at an impasse on the remaining three counts. How do you wish us to proceed?" After consulting counsel, Judge Sedwick decided to administer a modified *Allen* charge, *see Allen v. United States*, 164 U.S. 492 (1896).[14] Later that afternoon, the jury sent another note indicating that it was still unable to reach a unanimous verdict as to three counts. Judge Sedwick then called the jury into the courtroom to receive its decision.

[21] Plunk contends that the district court's *Allen* charge — when considered in conjunction with its discussion with the jury members regarding their near-unauthorized use of the dictionary — was unnecessarily coercive. We review a district court's decision to issue an *Allen* instruction for abuse of discretion. *See United States v. Wills*, 88 F.3d 704, 717 (9th Cir. 1996). The district court's deliverance of an *Allen*

[14]The charge stated, in relevant part:

> As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict, if each of you can do so without violating your individual judgment and conscience. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors.
>
> During your deliberations, you should not hesitate to reexamine your own views and change your opinion if you become persuaded that it is wrong. However, you should not change an honest belief as to the weight or effect of the evidence solely because of the opinions of your fellow jurors or for the mere purpose of returning a verdict. All of you are equally honest and conscientious jurors who have heard the same evidence. All of you share an equal desire to arrive at a verdict. Each of you should ask yourself whether you should question the correctness of your present position.

Tr. 15:49-50.

instruction "must be upheld unless it is clear from the record that the charge had an impermissibly coercive effect on the jury." *United States v. Lorenzo*, 43 F.3d 1303, 1307 (9th Cir. 1995).

[22] There is no per se rule in this circuit preventing the use of *Allen* instructions. *See United States v. Nickell*, 883 F.2d 824, 828 (9th Cir. 1989). Indeed, we recently acknowledged that "[a]n *Allen* charge is, on occasion, a legitimate and highly useful reminder to a jury to do its duty." *Rodriguez v. Marshall*, 125 F.3d 739, 750 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 2304 (1998). In assessing the coerciveness of an *Allen* charge, we must inquire into (1) the form of the instruction, (2) the total time of deliberation and the time of deliberation following the instruction, and (3) any other indicia of coerciveness. *See United States v. Cuozzo*, 962 F.2d 945, 951 (9th Cir. 1992).

[23] With respect to the form of the instruction, the court in *Jiminez v. Myers*, 40 F.3d 976 (9th Cir. 1993), emphasized in finding reversible error that the trial judge had failed to "instruct[ ] the hold-out juror not to surrender his or her sincere convictions." *Id.* at 981. There was no similar failure in this case. Quite the contrary, Judge Sedwick specifically directed the jurors "not [to] change an honest belief as to the weight or effect of the evidence solely because of the opinions of your fellow jurors or for the mere purpose of returning a verdict." The total duration of deliberations and the time that elapsed between the *Allen* charge and the verdict also suggest the absence of coercion. The jury had been deliberating for approximately two days when it initially apprised the judge that it was deadlocked as to three counts. After the *Allen* charge was administered, it took the jury roughly two hours to conclude its deliberations. We have, in the past, specifically approved of similar time frames. *See, e.g., United States v. Bonam*, 772 F.2d 1449, 1451 (9th Cir. 1985).

[24] None of the "other indicia" of coercion traditionally invoked by courts evaluating *Allen* charges is present in the

instant case, either. Judge Sedwick did not, for instance, know whether the seven decided counts were convictions, acquittals, or (as it turned out) a mixed bag. *See Rodriguez,* 125 F.3d at 751. Nor did he know the identity of the holdout jurors. *See United States v. Sae-Chua,* 725 F.2d 530, 532 (9th Cir. 1984). Moreover, the fact that the jury rendered a mixed verdict — convicting on some counts, acquitting on one, and hanging on others — suggests that it reviewed the evidence "rational[ly] and independent[ly]." *Cuozzo,* 962 F.2d at 952. Finally, the fact that the ratio of counts upon which the jury had reached unanimous verdicts to those upon which it had not was seven to three both before and after the charge negates any inference of coercion. Plunk contends that "[a]lthough the jury had reached a decision as to seven counts and was hung as to three both before and after the *Allen* instruction, there is no way of knowing whether its decision was the same as to the same counts." His speculation, however, is merely that: speculation. It is not "clear from the record" that the *Allen* charge had a coercive effect on the jury. *Lorenzo,* 43 F.3d at 1307.

VIII

At sentencing, one of Plunk's co-conspirators, Timothy Pierson, offered testimony indicating that Plunk had perjured himself at Pierson's own sentencing hearing. Pierson acknowledged under oath that he had personally asked Plunk to testify that Pierson "didn't know that there was cocaine on the trucks, that [he] was tricked, that [he] didn't join the conspiracy or know about it till late November, early December [1993]." He further testified that Plunk had sworn an affidavit to that effect and had testified in person at Pierson's sentencing hearing that the affidavit was correct. Pierson frankly admitted, however, that Plunk's affidavit was false, and that Pierson had in fact known of the conspiracy prior to the December 1993 meeting. Based in large part on Pierson's testimony, the district court found that Plunk had obstructed justice within the meaning of § 3C1.1 of the United States

Sentencing Guidelines,[15] and therefore adjusted Plunk's sentencing level upward two levels, from 41 to 43.[16]

Plunk contends on appeal that Pierson "could have been substantially impeached" by materials in the possession of Pierson's federal public defender, Kevin McCoy. According to Plunk's brief, McCoy's files contained notes, allegedly in Pierson's own hand, that contradicted some of the statements that Pierson made at Plunk's sentencing hearing. Plunk maintains that the prosecution's failures to discover and to disclose the notes constituted a violation of its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963).

[25] Pursuant to *Brady*, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. As Plunk correctly asserts, a prosecutor's *Brady* obligation extends to impeachment evidence. *See Giglio v. United States*, 405 U.S. 150, 154 (1972). However, "[w]hile the prosecution must disclose any [*Brady*] information within the possession or control of law enforcement personnel, it has no duty to volunteer information that it does not possess." *United States v. Monroe*, 943 F.2d 1007, 1011 n.2 (9th Cir. 1991) (internal quotation marks omitted). As a general matter, information "beyond that contained in the government's files" is not subject to the strictures of *Brady*. *See United States v. Hsieh Hui Mei Chen*, 754 F.2d 817, 824 (9th Cir. 1985). In this case, the notes that Plunk sought were in the files of the federal public defender; consequently, the prosecution did not "possess" or "control" the requested infor-

[15]Section 3C1.1 provides: "If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels." U.S.S.G. § 3C1.1.

[16]In a separate unpublished disposition filed contemporaneous herewith, we affirm the district court's upward adjustment.

mation. *Cf. United States v. Aichele,* 941 F.2d 761, 764 (9th Cir. 1991) (holding that a federal prosecutor had no *Brady* obligation with regard to information in the files of state authorities); *United States v. Friedman,* 593 F.2d 109, 120 (9th Cir. 1979) (holding that a prosecutor had no *Brady* obligation with regard to the diary of a defendant's co-conspirator). The government was therefore under no obligation to search for or to provide the notes.[17]

IX

In October 1994, Plunk filed a motion in the district court seeking an order barring further prosecution. He argued that because certain items of his property had been subject to administrative forfeiture pursuant to 19 U.S.C. § 1609, any criminal prosecution should be precluded by the Double Jeopardy Clause of the Fifth Amendment.[18] Specifically, he pointed to the administrative seizure and forfeiture of (1) a Rolex watch, (2) assorted firearms, (3) $9,660 in U.S. currency, and (4) $967.89 worth of gold. Judge Sedwick granted Plunk's motion and dismissed five counts of the indictment on double jeopardy grounds.

[26] On interlocutory appeal, however, this court reversed Judge Sedwick's decision to dismiss the several counts. *See United States v. Plunk,* Nos. 94-20421, 94-30422, 1995 WL 619299 (9th Cir. Oct. 17, 1995), *cert. denied,* 517 U.S. 1188 (1996) ("*Plunk I*").[19] The court observed that Plunk had received notice of the government's intention to seek forfeiture of his property but had failed to file a claim of ownership;

[17]A contrary rule would have the untoward consequence of eviscerating the attorney-client privilege between public defenders and their clients.

[18]The Double Jeopardy Clause provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V.

[19]Citation of the unpublished disposition is appropriate for purposes of establishing the law of the case. *See* Ninth Circuit R. 36-3.

consequently, pursuant to § 1609, the government had declared the property forfeited without a formal adjudication. Relying on *United States v. Cretacci*, 62 F.3d 307 (9th Cir. 1995), the *Plunk I* court held that "[t]he administrative forfeiture of unclaimed property . . . does not impose a 'punishment' for purposes of the Double Jeopardy Clause." *Plunk I*, 1995 WL 619299, at *1. Because Plunk had not asserted any claim to the seized property, the court determined, he had not been "punished" when it was forfeited. In reaching its conclusion, the court addressed and dismissed Plunk's contention that "he was forced not to formally contest the civil forfeitures (and thus suffer punishment) to protect his Fifth Amendment privilege in the pending criminal case." Invoking *Cretacci*, the court "rejected 'the argument that by requiring a defendant to claim his property we force him to sacrifice his right against self-incrimination in order to preserve his right against Double Jeopardy.' " *Id.* (quoting *Cretacci*, 62 F.3d at 311). The court concluded:

> In light of the rationale set forth in *Cretacci*, we hold that the forfeiture of Plunk's abandoned property was not a "punishment," and thus Plunk was not placed in jeopardy. Accordingly, the subsequent criminal prosecution is not barred by the Double Jeopardy Clause.

Id. at *2.

In this appeal, Plunk maintains that notwithstanding *Plunk I*, "the instant convictions and sentences and further, the other counts of indictment are jeopardy barred and this court must reverse and remand with an order precluding further prosecution for same." The doctrine of "law of the case," however, precludes a reevaluation of Plunk's contention. Under that doctrine, "the decision of an appellate court on a legal issue must be followed in all subsequent proceedings in the same case." *Jeffries v. Wood*, 114 F.3d 1484, 1489 (9th Cir.) (en banc) (quoting *In re Rainbow Magazine, Inc.*, 77 F.3d 278,

281 (9th Cir. 1996)), *cert. denied,* 118 S. Ct. 586 (1997). Although courts retain some discretion to revisit issues decided by prior panels, this discretion is limited. *See Thomas v. Bible,* 983 F.2d 152, 155 (9th Cir. 1993). "[T]he prior decision of legal issues should be followed on a later appeal 'unless (1) the evidence on a subsequent trial was substantially different, (2) controlling authority has since made a contrary decision of the law applicable to such issues, or (3) the decision was clearly erroneous and would work a manifest injustice.' " *Kimball v. Callahan,* 590 F.2d 768, 771-72 (9th Cir. 1979) (quoting *White v. Murtha,* 377 F.2d 428, 431-32 (5th Cir. 1967)) (enumeration added).

Plunk apparently contends that the Supreme Court's recent decision in *United States v. Ursery,* 518 U.S. 267 (1996) — which was handed down after this court's decision in *Plunk I* — constitutes intervening controlling authority that justifies a departure from traditional law-of-the-case principles. In *Ursery,* the Court held that, as a general matter, "*in rem* civil forfeitures are neither 'punishment' nor criminal for purposes of the Double Jeopardy Clause." *Id.* at 292. In making his argument for reversal under *Ursery,* Plunk emphasizes two aspects of the Court's decision. First, he points to the Court's distinction between *in rem* civil forfeiture proceedings, which are purely remedial and therefore do not give rise to a double jeopardy bar, and *in personam* civil penalties, which are often punitive and thus can give rise to such a bar. Second, he points to a footnote in which the Court suggested that even some *in rem* civil forfeitures could constitute "punishment" for double jeopardy purposes: "[W]here the 'clearest proof' indicates that an in rem civil forfeiture is 'so punitive either in purpose or effect' as to be equivalent to a criminal proceeding, that forfeiture may be subject to the Double Jeopardy Clause." *Id.* at 289 n.3. Relying on these two portions of *Ursery,* Plunk contends that because "factually, tactically, statutorily, and procedurally, the subject administrative forfeitures . . . were in fact in personam criminal forfeitures tactically directed at [him] to punish him," he is entitled to the

protection of the Double Jeopardy Clause against further prosecution.

The *Ursery* decision does not, however, fit within the narrow exception to the law-of-the-case doctrine for "contrary decision[s]" of "controlling authorit[ies]." *Kimball,* 590 F.2d at 772. Although the United States Supreme Court is, no doubt, a "controlling authority," its decision in *Ursery* was in no way "contrary" to *Plunk I. Plunk I* was decided on the ground that Plunk's failure to "assert any claim to the seized property," as authorized by 19 U.S.C. § 1608, deprived him of "any right he had to" it. *Plunk I,* 1995 WL 619299, at *1. This, in turn, defeated any claim under the Double Jeopardy Clause. *See id. Ursery* neither spoke to this issue, nor did its holding affect it. Under well-established law-of-the-case doctrine, we therefore may not revisit Plunk's double jeopardy claim. *See Kimball,* 590 F.2d at 772.

X

Plunk has raised numerous challenges to the district court's decision, but to no avail. For the foregoing reasons, we decline to disturb either Plunk's convictions or his sentence.

AFFIRMED.

FILED
AUG 28 1998
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 96-30363
	)	
Plaintiff-Appellee,	)	
	)	D.C. No. A94-
	)	0036 CR (JWS)
v.	)	
	)	
GERALD FRANK PLUNK,	)	MEMORANDUM*
	)	
Defendant-Appellant,	)	
	)	

Appeal from the United States District Court
for the District of Alaska
John W. Sedwick, District Judge, Presiding

Argued and Submitted February 2, 1998
Seattle, Washington

Before: BROWNING, SKOPIL, and O'SCANNLAIN
Circuit Judges

Appellant Gerald Frank Plunk appeals his convictions and sentence on various counts arising out of his participation in an interstate cocaine smuggling conspiracy. The relevant facts

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

are known to the parties and we shall not repeat them here except as necessary.

Plunk raised thirteen separate issues on appeal. We deal with only five of those issues here.[1]

One. The district court did not abuse its discretion in excluding Plunk's proffered expert testimony regarding the operation of the minimum-mandatory provisions of the U.S. Sentencing Guidelines. The testimony was merely cumulative of evidence presented earlier in the trial. Moreover, the probative value of the evidence was outweighed by the potential for prejudice. See Fed. R. Evid. 403.

Two. The district court did not abuse its discretion in declining to instruct the jury that the potential punishments of the cooperating witnesses could be considered in assessing their credibility. Instruction 37 sufficiently covered Plunk's theory of the case. See United States v. Hernandez-Escarsega, 886 F.2d 1560, 1570 (9th Cir. 1989).

Three. The district court did not err in refusing to instruct the jury that because conspiracy is a lesser included offense of continuing criminal enterprise ("CCE"), the jury could not deliberate or reach a verdict as to conspiracy until it had reached a unanimous verdict of not guilty as to CCE. Plunk was required but failed to make a timely request for the instruction. See United States v. Jackson, 726 F.2d 1466, 1469 (9th Cir. 1984).

Four. The district court did not abuse its discretion in refusing to continue Plunk's sentencing in light of his assertion that a co-conspirator's attorney had told him that certain wiretaps that had led to evidence against him were illegal. Plunk has not contended that any court has questioned the validity of the wiretaps; his co-conspirator's attorney's

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[1] We have addressed eight of the thirteen issues in a separate published opinion filed contemporaneously herewith.

speculation is insufficient. See United States v. Lewis, 991 F.2d 524, 528-29 (9th Cir. 1993).

Five. The district court's determination that Plunk had obstructed justice within the meaning of U.S.S.G. § 3C1.1 was not clearly erroneous. There is ample evidence in the record to support the district court's factual finding that Plunk testified falsely at a co-conspirator's sentencing hearing. Upon finding that Plunk had obstructed justice, the two-point sentence enhancement was mandatory. See United States v. Ancheta, 38 F.3d 1114, 1117-8 (9th Cir. 1994).

AFFIRMED.

FILED
OCT 17 1995
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant, Cross-Appellee, v. GERALD FRANK PLUNK, Defendant-Appellee, Cross-Appellant.	Nos. 94-30421 94-30422 D.C. No. CR-94-036-01-JWS MEMORANDUM*

Appeal from the United States District Court
for the District of Alaska
John W. Sedwick, District Judge, Presiding

Argued and Submitted June 5,1995
Submission Deferred June 13, 1995
Resubmitted September 20,1995
Seattle, Washington

Before: BROWNING, WRIGHT, and T.G. NELSON, Circuit Judges

We have jurisdiction over this interlocutory appeal. United States v. Chick, 61 F.3d 682 (9th Cir. 1995).

In United States v. Cretacci, 62 F.3d 307 (9th Cir.1995), we held that if property seized by an agency under the administrative forfeiture procedure, 19 U.S.C. § 1609(a), is

not claimed within a specified time limit, the property is declared "forfeited" and may be sold. The administrative forfeiture of unclaimed property simply constitutes the taking of abandoned property, and as such, does not impose a "punishment" for purposes of the Double Jeopardy Clause. Id. at 310.

In this case, Plunk does not dispute that he received notice of the Government's intent to seek forfeiture of the property seized from his home and his person and that he had to file a claim to preserve any right he had to that property. The required notice was also published in USA Today. Plunk did not file a claim and the property was administratively forfeited. If no claim is filed, the Government has the authority to declare the property forfeited without a judicial adjudication. See 19 U.S.C. § 1609; 21 C.F.R. § 1316.77. This declaration has "the same force and effect as a final decree and order of forfeiture in a judicial forfeiture proceeding in a district court of the United States." 19 U.S.C. § 1609(b). In other words, administrative forfeiture can be used only to obtain the forfeiture of unclaimed property.

Because Plunk did not assert any claim to the seized property, he was not punished when it was forfeited. Further, because Plunk was not a party to the prior administrative forfeiture, he was not in jeopardy and his trial and punishment in the criminal prosecution would not amount to double jeopardy.

Plunk responds that he was forced not to formally contest the civil forfeitures (and thus suffer punishment) to protect his Fifth Amendment privilege in the pending criminal case. He argues that although the notices of seizure did not specify the owner, the actual judgments of forfeiture listed his inmate number and adjudicated him as the owner.

In Cretacci, we rejected "the argument that by requiring a defendant to claim his property we force him to sacrifice his right against self-incrimination in order to preserve his right against Double Jeopardy." Id. at 311. The court pointed out

that "[a] defendant's claim of ownership at a pre-trial suppression hearing of property that he contends was unlawfully seized may not be used to prove the defendant's guilt." Id. Similarly, "a defendant's claim of ownership of property that was subject to forfeiture may not be used for that purpose." Id.

Therefore, Plunk is in no different a position than a criminal defendant who wishes to suppress contraband seized from him. Such a defendant must assert ownership of the property in order to claim that its seizure invaded his rights under the Fourth Amendment. See United States v. Salvucci, 448 U.S. 83 (1980).

Further, there was no "adjudication" of Plunk's ownership of the cash, gold, firearms and watch. The two declarations of forfeiture do contain computer-generated information at the top of the documents stating the seizure number, case number, item(s) seized, value, seizure date and place, judicial district, and note: "OWNER: PLUNK, GERALD F.," "SEIZED FROM: PLUNK, FRANK (INMATE #7603)." However, these notations do not rise to the level of a judicial adjudication of ownership where a claim or a petition for remission or mitigation has not been filed.

In light of the rationale set forth in Cretacci, we hold that the forfeiture of Plunk's abandoned property was not a "punishment," and thus Plunk was not placed in jeopardy. Accordingly, the subsequent criminal prosecution is not barred by the Double Jeopardy Clause. Because we reverse the district court's order dismissing the five of twelve counts on the grounds of double jeopardy, Plunk's cross-appeal of the district court's denial of his motion to dismiss the entire indictment is moot and is therefore dismissed.

REVERSED AND REMANDED IN PART, DISMISSED IN PART.

FILED
DEC 14 1995
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	NOS. 94-30421
	)	94-30422
Plaintiff-Appellant,	)	
Cross-Appellee,	)	D.C. No. CR-94-
	)	036-01-JWS
vs.	)	
	)	
GERALD FRANK PLUNK,	)	
	)	
Defendant-Appellee,	)	
Cross-Appellant.	)	
	)	

Before: BROWNING, WRIGHT, and T.G. NELSON, Circuit Judges

The panel has voted to deny cross-appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

The cross-appellant's Emergency Motion Under Circuit Rule 27-3 is DENIED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOS. 94-30421 & 94-30422
CT/AG#: CR-94-036-01-JWS

UNITED STATES OF AMERICA

Plaintiff/Appellant-
Cross-Appellee

v.

GERALD FRANK PLUNK

Defendant/Appellee-
Cross-Appellant

FILED
DEC 29 1995
UNITED STATES
DISTRICT COURT
DISTRICT OF ALASKA
/S/
_____, Deputy

APPEAL FROM the United States District Court for the District of Alaska (Anchorage).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Alaska (Anchorage) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is REVERSED and REMANDED in part, DISMISSED in part.

Filed and entered October 17, 1995.

A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST

DEC 22 1995

by: /S/
Deputy Clerk

FILED
NOV 17 1994

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

By:_____/S/_____ Deputy

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)
	) Case No. A94-036 CR
	) (JWS)
Plaintiff,	)
	)
v.	) ORDER FROM
	) CHAMBERS
GERALD FRANK PLUNK, et al.,	) (Motion to Dismiss -
	) Docket 185)
	)
Defendant.	)
	)

MOTION PENDING

Defendant Gerald Frank Plunk ("Plunk") filed a motion at docket 185 requesting dismissal of all charges in the superseding indictment against Plunk on the grounds that his prosecution would violate the Double Jeopardy Clause of the Fifth Amendment. The motion does not involve Plunk's co-defendant, Timothy Pierson ("Pierson"). Magistrate Judge John Roberts, to whom the motion was referred for a report and recommendation pursuant to Local Magistrate Rule 4, has

recommended that the motion be granted. This court reviews de novo.[2]

PROCEDURAL POSTURE

Plunk and Pierson were to have been tried on October 31, 1994. Plunk filed his double jeopardy motion on October 26, 1994.[3] No matter how this court may decide the double jeopardy motion, trial as to Plunk should not proceed until after the completion of an expedited review in the Court of Appeals. See Abney v. United States, 431 U.S. 651, 662 N.8 (1977). Trial in this case is expected to take several weeks and will involve many witnesses who must be transported to Alaska from as far away as the East Coast. The interest in trying Plunk and Pierson in a single trial is especially strong.

Following a conference with counsel and a hearing on the record, the trial date for both defendants was continued until January 3,1995. Application of the Speedy Trial Act makes it virtually impossible to delay Pierson's trial beyond that date. This court set a briefing schedule allowing for the

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[2]Ordinarily, in this District, following an initial report and recommendation from a magistrate judge, the parties have an opportunity to file objections and responses to objections which are considered by the magistrate judge before he or she issues a final report and recommendation. Here the requirement for expedited pre-trial review in the Court of Appeals, United States v. Abney, 431 U.S. 651, 662 n.8 (1977), and the time constraints of the Speedy Trial Act, 18 U.S.C. § 3161 et seq., have required this court to consider the objections and responses as part of its de novo review without a final report and recommendation from the magistrate judge.

[3]Plunk's counsel cannot be seriously faulted for filing the motion late, because it is based upon an evolving area of the law which is only now coming to the attention of counsel. Indeed, were the potential double jeopardy ramifications of civil forfeitures apparent earlier, it is highly unlikely the government would have risked its prosecution of Plunk on charges which could produce a term of incarceration exceeding 30 years and a fine of up to $4,000,000 in order to secure administrative forfeitures of chattels whose combined estimated worth is less than $16,170.

entry of this order no later than November 17, 1994, which should afford enough time for expedited appellate review. See United States v. Miranda-Parra, 637 F.2d 610 (9th Cir. 1980) (expedited double jeopardy appeal decided in 32 days). It is hoped that the appeal will be decided in time to allow a single trial to proceed on January 3, 1995.

BACKGROUND

On March 22, 1994, a one-count indictment charging Plunk with conspiracy to distribute cocaine in Alaska from the "Fall of 1987 until no later than April, 1991" in violation of 21 U.S.C. §§ 841(a)(1) and 846 (the "Alaska I conspiracy") was returned. Plunk was arrested on March 25, 1994. On April 26, 1994 a superseding indictment was filed.

The superseding indictment contains 12 counts: Count 1 charges Plunk and Pierson with conspiracy to transport cocaine shipped from Columbia [sic] across the "Lower 48" states of the Union from April 1, 1993, until December 31, 1993 in violation of 21 U.S.C. §§ 841(a)(1) and 846 (the "Lower 48" conspiracy). Count 2 charges Plunk with engaging in a continuing criminal enterprise from about April 1993 through December 1993 in violation of 21 U.S.C. § 848. Counts 3 through 6 charge Plunk with using a communications facility to facilitate drug trafficking in violation of 21 U.S.C. § 843(b). Counts 7 and 8 charge Pierson with violating 21 U.S.C. § 843(b). Counts 9 through 11 charge Plunk with possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1). Count 12 charges Plunk with conspiracy to distribute cocaine in Alaska from the Fall of 1980 until December 31, 1993 (the "Alaska II" conspiracy).

In the meantime, agents of the Drug Enforcement Administration ("DEA") seized certain items or personal property pursuant to 21 U.S.C. § 881, which were later declared forfeit to the United States pursuant to 19 U.S.C. § 1609 as follows: On March 25, 1994, a Rolex wristwatch valued at $1,500 was the subject of Seizure # 152090 and declared forfeit on June 3, 1994. On March 24, 1994,

assorted firearms valued at $4,040 were the subject of Seizure # 152183 and declared forfeit on June 10, 1994. On March 24, 1994, currency in the amount of $9,660 was the subject of Seizure # 152199 and declared forfeit on June 24, 1994. On March 24, 1994, three small bags of placer gold valued at $967.89 were the subject of Seizure # 152824 and declared forfeit on August 24, 1994.

The declarations of forfeiture all identify Plunk as the property's owner at the time of seizure.[4] Further, as the notices of seizure state, all the property was seized "because it was used or acquired as a result of a drug-related offense." All of the property, save the Rolex, was found at Plunk's residence on March 24, 1994, when officers executed a search warrant. The Rolex was taken from Plunk when he was arrested on March 25, 1994. According to the Declaration of William J. Snider, Forfeiture Counsel of DEA, each of the above four seizures was accepted for administrative forfeiture based upon an evaluation process described in his declaration.

An additional forfeiture proceeding involving Plunk's property is pending. On September 8, 1994, the government filed its complaint in United States v. Four Aircraft, Case No. A94-401 CIV (JKS). The case is before Judge Singleton of this District. There, the Government seeks forfeiture of four aircraft registered to Plunk on the grounds that they are "property or proceeds traceable to an exchange for controlled substances in violation of 21 U.S.C. § 801 et seq."[4] According to the Government, "The facts and circumstances supporting the seizure and forfeiture of the defendant aircraft and parts are contained in (the attached) Affidavit of Special Agent Robert E. Cayford of [DEA].[5] On September 23,

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[4]Plunk did not contest the forfeitures. His briefing indicates that the decision not to file a claim to the property was made in order to preserve his Fifth Amendment right not to testify.

[4] Verified Complaint For Forfeiture at ¶ 1, Case No. A94-401 CIV (JKS).

[5] Id. at ¶ 9. The facts and circumstances recounted by Mr. Cayford include alleged transactions which form part of each of the two alleged conspiracies.

1994, Plunk filed a claim in the action asserting ownership of the four planes.

On October 27, 1994, the Government moved to stay, or alternatively, to dismiss Four Aircraft pending disposition of its request for en banc reconsideration of the decision by the Court of Appeals for the Ninth Circuit in United States v. $405,089.23, 33 F.3d 1210 (9th Cir. 1994). The general averment that the forfeiture of the four aircraft is based upon the violation of 21 U.S.C. § 801 et seq., coupled with the information in the September 8, 1994, affidavit of DEA Special Agent Robert Cayford which is incorporated into the complaint by reference, indicates that the forfeiture of the aircraft is sought on the basis of Plunk's participation in the Alaska conspiracies and the Lower 48 conspiracy as well as upon possession of cocaine with intent to distribute. In the motion for stay, the Government represented that the charges in the instant criminal prosecution are the same violations underpinning the civil forfeiture sought in Four Aircraft.

On November 16, 1994, Judge Singleton issued an order which stayed further proceedings in Four Aircraft pending the outcome of all criminal prosecutions of Plunk. Obviously, Judge Singleton found this course of action more appropriate than either staying the matter pending disposition of the en banc request in $405,089.23, 33 F.3d at 1210, or dismissing the civil forfeiture action without prejudice as requested by the Government.

Given the stay in Four Aircraft, this court concludes that Plunk has not yet been punished in the judicial forfeiture and that he is not presently subject to the burden of defending multiple proceedings asserting commission of the same offenses. For these reasons the continued prosecution of Plunk on the charges in the superseding indictment is not foreclosed on double jeopardy grounds by the judicial forfeiture action in Four Aircraft. See North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

DISCUSSION

The magistrate judge recommended that Plunk's double jeopardy motion be granted at docket 208. Based upon this court's de novo review, with the exception of the implied finding of fact and related conclusion of law that the administrative forfeitures are based upon all the same offenses as those with which Plunk is charged in the superseding indictment, the findings and conclusions made by the magistrate judge are correct and are adopted. The implied factual finding and related conclusion that the administrative forfeitures are based upon the same offenses requires discussion.

To bar subsequent prosecution, of course, a forfeiture must be based on the same offense charged in the indictment. $405,089.23, 33 F.3d at 1216. The Supreme Court recently explained that the only proper way to test for the "sameness" of two crimes is to compare the individual elements of each. If there is not at least one different element, then the crimes are the same offense for double jeopardy purposes. United States v. Dixon, ___ U.S. ___, 113 S.Ct. 2849, 2856 (1993). In overruling Grady v. Corbin, 495 U.S. 508 (1990), the Dixon Court held that, even if proof of one of the elements of the second crime will involve proof of the same conduct underpinning an element of the first crime, there is no double jeopardy problem so long as at least one element is not common to both.

The Government argues that application for the same element test to the completed administrative forfeitures and the crimes charged in the superseding indictment discloses that prosecution of Plunk as charged, will not expose him to double jeopardy. With regard to the conspiracy counts in the superseding indictment, this court understands the Government's argument to be as follows. According to the Snider declaration, the administrative forfeitures were all based upon alleged violations of 21 U.S.C. § 841(a)(1) which criminalizes the possession of cocaine with intent to distribute. Violation of 21 U.S.C. § 841(a)(1) is a crime whose elements do not include the element of agreement, which is required for any conspiracy so the crimes charged in counts 1 and 12 differ

from the conduct upon which the forfeitures were based according to Snider's explanation.

At most, the Government would acknowledge some merit to the proposition that the administrative forfeitures did implicate the Alaska I and Alaska II conspiracies.[6] This concession would be consistent with the fact that the Snider declaration also indicates that the forfeitures proceeded based upon Plunk's arrest. Plunk was arrested because he was charged in the original indictment with participation in the Alaska I conspiracy.

So long as the administrative forfeitures are not seen to involve more than distribution of cocaine in Alaska and the Alaska I conspiracy, the Government is correct, because a comparison of the Alaska I conspiracy described in the original indictment and the "Lower 48" conspiracy charged in count 1 and the Alaska II conspiracy charged in count 12 shows that the elements to be proved are different. To prove the Alaska I conspiracy, the Government would have to prove agreement to distribute cocaine in Alaska from the Fall of 1987 until no later than April of 1991. In contrast, to prove guilt on Count 1, the Government would have to prove that Plunk agreed with someone else to distribute cocaine across the "Lower 48" from about April of 1993 until December of 1993. To prove the Alaska II conspiracy charged in count 12, the Government would have to prove that Plunk agreed with someone to distribute cocaine in Alaska from the Fall of 1980 until December of 1993. The three conspiracies charged depend on proof of demonstrably different agreements and are, therefore, different crimes.

Count 2 charging continuing criminal enterprise involves several elements not included in either the violation of 21 U.S.C. § 841(a)(1), cited directly by Snider, or the Alaska I conspiracy indirectly involved by Snider, as the

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[6] The government makes little of the differences between these two conspiracies, which the government calls simply the "historical" conspiracy. The government term for the Lower 48 conspiracy is the "Columbian" [sic] conspiracy.

bases for the administrative forfeitures. See 21 U.S.C. § 848. Counts 3 through 6 charge that Plunk used communication devices to facilitate drug trafficking. Again it is apparent that the elements of the crime are different from either possession with intent to distribute or conspiracy to distribute cocaine. See 21 U.S.C. § 843(b).

Counts 9,10, and 11 charge Plunk with possession with intent to distribute cocaine, the very crime upon which Snider says the administrative forfeitures proceeded, but the distribution charged involves transactions associated with the Lower 48 conspiracy, not the Alaska I conspiracy charged in the original indictment extant at the time of the seizures. Thus, it would appear that these three counts need not be dismissed if one accepts the Government's analysis of the forfeiture proceedings.

The difficulty with the Government's analysis is that it depends upon accepting at somewhat less than full face value an explanation of the bases for the four administrative forfeiture proceedings offered by DEA counsel Snider which is not entirely consistent with all of the available information, including information referenced by Mr. Snider. According to the Snider declaration, the decision to accept each of the four cases for administrative forfeiture was made at the end of an evaluation process which "included a legal review of the probable cause that existed to seize [the item seized]." Snider declaration at ¶¶ 4(a), 5(a), 6(a), and 7(a).

Evidence of what probable cause was used to support the three property seizures at Plunk's residence[7] is found in the March 22, 1994, affidavit of DEA special agent Cayford used to obtain the search warrant for the residence. Cayford's affidavit is not limited to asserting probable cause to believe Plunk is guilty only of simple possession with intent to distribute or participation in the Alaska I conspiracy. The Cayford affidavit recites probable cause to believe facts that would support Plunk's participation in the Alaska I

[7] These were the seizures of the $9,660 in U.S. currency, the firearms, and the placer gold.

conspiracy, the Alaska II conspiracy, and the Lower 48 conspiracy.

The information Cayford attributes to Warren Jeff Funderburk at ¶ 1 of the Background section of his affidavit indicates that on 10 to 15 occasions between Fall of 1988 and Spring of 1990, Plunk sold kilogram quantities of cocaine to Funderburk, who then resold the drug. This information appears relevant to either the Alaska I or Alaska II conspiracies, as well as to possession with intent to distribute in Alaska. At ¶ 2 of the affidavit, Cayford attributed information to an anonymous source who described himself as a facilitator in the Plunk transfers to Funderburk.[8] The information Cayford attributes to Hal Booher at ¶¶ 3 and 4 concerning repeated interstate deliveries of 200 to 220 kilogram loads of cocaine is information associated with the Lower 48 conspiracy, as well as with possession with intent to distribute somewhere outside Alaska. The assertions in ¶ 4(D) that Booher met Plunk in November 1983 and that Booher learned Plunk distributed cocaine in Alaska appear to establish a pattern of distribution more likely consistent with the Alaska II conspiracy than the Alaska I conspiracy.[9] The information in ¶ 5 clearly relates to distribution in Alaska and,

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[8] The size of Plunk's sales to Funderburk, the participation of a third party as a "facilitator," and the resale by Funderburk all imply that Plunk had some sort of agreement regarding the distribution and, hence, was participating in a conspiracy.

[9] It may first be observed that in isolation this paragraph is equally consistent with simple possession and distribution. The absence of quantity information, such as the kilogram sales to Funderburk, and the absence of any information that the sales involved a "facilitator" makes this information consistent with simple distribution not involving an agreement with others. However, in the overall context of the affidavit, it seems as likely to evidence the outcome of joint effort as sales by Plunk acting alone. As to the question of whether the information relates to the Alaska I or Alaska II conspiracies, the way the paragraph is written leaves unclear when Booher learned of Plunk's participation in cocaine distribution in Alaska. It is clear Booher met Plunk in November of 1983. Thus, it is a more natural reading of the paragraph to conclude that Plunk was involved in distributing cocaine in Alaska prior to the inception of the Alaska I conspiracy in Fall of 1987.

combined with the other information, may also relate to either the Alaska I or Alaska II conspiracies.

The fourth seizure made at the time of Plunk's arrest necessarily proceeded on the basis that Plunk was properly arrested. Thus, seizure of the Rolex appears to have been based upon probable cause to believe that Plunk had committed the crime charged in the original indictment--participation in the Alaska I conspiracy.

This court finds that the crimes the Government had reason to believe Plunk had committed at the time of the seizures and upon which the administrative forfeitures proceeded were that Plunk possessed cocaine with intent to distribute it in Alaska, that Plunk possessed cocaine with intent to distribute it somewhere outside Alaska, and that Plunk was a member of the Alaska I, Alaska II and Lower 48 conspiracies. When this finding is coupled with the other findings and conclusions reached by the magistrate judge and adopted by this court, it follows that counts 1, 9, 10, 11 and 12 must be dismissed, because Plunk cannot be put in jeopardy on charges for which he has already been punished. The remaining counts being constituted neither of the same criminal acts upon which the administrative forfeitures proceeded, nor criminal acts comprised of the same elements under the Dixon test, should not be dismissed. Prosecution of Plunk on counts 2 (continuing criminal enterprise), and counts 3 through 6 (communications facility used in drug trafficking) may proceed without violating the Double Jeopardy Clause.

Plunk invites this court to hold that count 2 through 6 must be dismissed. He makes several points. First, each Notice of Seizure recites that the subject property "was seized by Special Agents of the [DEA] for forfeiture under [21 U.S.C. § 881] because it was used or acquired as a result of a **drug-related offense**. (See [21 C.F.F. § 1316.91(d)] for the definition of the term 'drug-related offense.')" (Boldface in original.) The regulation cited in the notices to define the crime supporting the forfeitures provides:

> The term Drug-Related Offense means any proscribed offense which involves the possession, distribution, manufacture, cultivation, sale, transfer, or the attempt or conspiracy to possess, distribute, manufacture, cultivate, sell or transfer any substance the possession of which is prohibited by Title 21 U.S.C.

21 C.F.R. § 1316.91(d).

Plunk also points out that only two of the administrative forfeitures were the subject of notice of forfeiture letters sent prior to the return of the superseding indictment on April 26, 1994. The letter concerning the Rolex was sent to Plunk and to the publisher on April 18, 1994. The letter concerning the firearms was sent on April 25, 1994. The other two letters concerning the $9,660 and the placer gold were not sent until May 9, 1994. However, there is nothing in the letters which purports to retroactively alter the basis for the seizures, all four of which antedate the superseding indictment.

Plunk also notes that in each of the four proceedings, the Declaration of Forfeiture fails to recite the specific crime upon which the forfeiture was predicated. Each merely indicates that the property was seized pursuant to 21 U.S.C. § 881, that notice was given pursuant to 19 U.S.C. § 1607, and that the property is declared forfeit pursuant to 19 U.S.C. § 1609.

Plunk is correct to the extent that the statutory and regulatory underpinnings of the seizures are consistent with forfeitures based upon all of the crimes charged in the superseding indictment; these authorities are written broadly to embrace any violation of 21 U.S.C. § 801 et seq. However, Plunk is incorrect to the extent that he maintains the facts show the administrative forfeitures were based upon the continuing criminal enterprise and use of communication facility crimes. The probable cause supporting the seizures did not include information supporting the continuing criminal enterprise and communication facility crimes.

Plunk advances additional arguments, including arguments based on the concepts of waiver and estoppel. This court has considered all of Plunk's other arguments and finds them to be without merit.

CONCLUSION

For the reasons set forth above and for the reasons provided in the report and recommendation at docket 208, the motion at docket 185 is **GRANTED IN PART** and **DENIED IN PART** as follows: Counts 1, 9, 10, 11, and 12 are dismissed. Counts 2 through 6 inclusive remain set for trial on January 3, 1995.

Any party not satisfied with this court's decision shall immediately take an expedited appeal as contemplated by United State [sic] v. Abney, 431 U.S. 652, 662 n.8 (1977). The Clerk is directed to expedite preparation of whatever record on appeal the parties may designate. The parties are authorized to designate documents filed in Case No. A94-401 Civ (JDS) for inclusion in the record on appeal in this action. The Clerk shall call counsel immediately upon filing of this order and counsel shall promptly obtain copies.

DATED this 17th day of November, 1994 at Anchorage, Alaska.

/S/

JOHN W. SEDWICK
UNITED STATES DISTRICT JUDGE

FILED
NOV 4 1994

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

By: /S/ Deputy

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)
	) Case No. A94-036 CR
	) (JWS)
Plaintiff,	)
	)
v.	) RECOMMENDATION
	) REGARDING MOTION TO
GERALD FRANK	) DISMISS ON GROUNDS
	) OF DOUBLE JEOPARDY
Defendant.	)
	) (Document No. 185)

Defendant **GERALD FRANK PLUNK** moves for an order barring his prosecution in the instant case on grounds of double jeopardy. Plunk contends that his further prosecution violates the Fifth Amendment's Double Jeopardy Clause because he has already been placed in jeopardy in administrative and civil forfeiture proceedings. Docket No. 185. The government opposes the motion at Docket No. 189.[1] For reasons stated below, I recommend that the Motion to Dismiss be GRANTED.

[1] The following additional pleadings were filed:

Docket No. 193, Defendant's Supplemental Exhibits in Support of Motion for Order Barring Further Prosecution on Grounds of Double Jeopardy; *Docket No. 196*, Government's Response to Defendant's Motion for Continuance Pending Interlocutory Appeal on Grounds of

BACKGROUND

Gerald Plunk was indicted on March 23, 1994, for conspiracy to distribute cocaine in violation of 21 U.S.C. § 846. Mr. Plunk was arrested March 25, 1994, and detained in custody pursuant to a pretrial detention order. At the detention hearing the government presented evidence and argued that certain items (hand guns, currency in a heat-sealed package, placer gold, passport) hidden in Plunk's residence were incriminating. Agents of the Drug Enforcement Administration (DEA) executed search warrants as follows: A94-049 MJ issued March 22, 1994 for A-Frame single residence, 14940 Long Bow Drive, Anchorage; A94-051 MJ issued April 5, 1994 for Big Mountain Lodge, Iguigig, Alaska; A94-056 MJ issued April 5, 1994 for Safe Deposit Box #190 FNBA-Main Branch, Anchorage; A94-095 MJ issued April 26, 1994 for Fly-in Cabin, Hock Lake; and A94-096 MJ issued April 26, 1994 for Floor Safe, 2101 W. 29th Ave # 27, Anchorage. Subsequently, the government seized four (4) airplanes at the lodge and certain real property. Publication of Notice of Seizures were made in late May and early June, 1994.

The government issued Notices of Seizure for property seized March 24, 1994 from Gerald Plunk as follows:

Nine (9) assorted weapons valued at $4,040;

$9,660 in currency; and

Double Jeopardy; *Docket No. 197*, Government's Supplementary Response to Defendant's Motion to Dismiss; *Docket No. 198*, Supplemental Briefing Regarding Divestiture of Jurisdiction Pending Appeal on Double Jeopardy Issue; *Docket No. 202*, Defendant's Reply to Government's Opposition and Government's Supplemental Opposition to Motion to Dismiss on Grounds of Double Jeopardy; *Docket No. 203*, Defendant's Request for Evidentiary Hearing. Defendant's Supplemental Reply to Government's Opposition and Government's Supplemental Opposition to Motion for Order Barring Further Prosecution of Grounds of Double Jeopardy was filed in Open Court on November 3, 1994.

Placer gold valued at $967.89.

First publication of this property occurred in May 1994. See Exhibits A, B and C to Defendant's Motion for Order Barring Further Prosecution, Docket No. 185. A separate Notice of Seizure was published April 27, 1994, for a

> *Rolex wristwatch valued at $1,500*, seized from Gerald Plunk on or about March 25, 1994.

See Exhibit D, Docket No. 185.

A Declaration of Forfeiture was issued by the Senior Attorney, Office of Chief Counsel, Asset Forfeiture Section of the Department of Justice for the Rolex wristwatch on June 3, 1994 and for the $9,660 in currency on June 24, 1994. See Exhibit B to Government's Supplementary Response, Docket No. 197. The nine (9) firearms and the placer gold were also forfeited administratively on June 10, 1994 and August 19,1994, respectively. See Exhibits E and F attached to Plunk's Notice of Additional Exhibits, Docket No. 205. These declarations indicate that no claims were filed for said property.

A superseding indictment filed April 26, 1994, added a co-defendant Timothy Pierson. It alleges charges against Plunk of continuing a criminal enterprise (21 U.S.C. § 848), illegal use of a communication facility (21 U.S.C. § 843(b)), possession of cocaine with intent to distribute (21 U.S.C. § 841(a)(1) and a second conspiracy to distribute cocaine (21 U.S.C. § 846). Count two of the superseding indictment seeks to forfeit a (different) bag of currency and various described pieces of real estate allegedly constituting or derived from drug trafficking proceeds during the continuing criminal enterprise pursuant to 21 U.S.C. § 853 and 848.

On September 8, 1994, the United States filed a verified complaint to enforce the provisions of 21 U.S.C. § 881(a)(6) for forfeiture of four (4) aircraft traceable to an exchange for controlled substances in violation of 21 U.S.C.

§ 801 et seq. See United States v. Four Aircraft, etc., Case No. A94-401 Civil (D.Alaska). The complaint alleged Gerald Plunk as the registered owner of the aircraft. The in rem complaint relied upon the same investigation as led to Plunk's indictment. Plunk filed a Notice of Claim on September 23, 1994. On October 27, 1994, the government moved for a stay of proceedings pending the outcome of Plunk's criminal prosecution.

DISCUSSION

Plunk contends that jeopardy attached when the government adjudicated administrative forfeitures of property seized by the government as a result of the underlying alleged criminal conduct. He contends that he was forced to suffer the forfeiture of his personal property in order to maintain his constitutional right to remain silent and avoid self-incrimination. He objects to further proceedings of the criminal trial including empaneling of the jury. Plunk argues that he has already been punished as a result of seizures and administrative forfeiture of his personal property. He seeks an order dismissing the indictment as to him with prejudice.

The government responds that the seizure of the property does not constitute "punishment" or consecutive proceedings as defined by case law. Government's Response, Docket No. 189, p.2. The government argues that administrative forfeitures are distinct from civil forfeitures with respect to the Double Jeopardy Clause of the Fifth Amendment. It claims that Plunk has not been "punished" by the administrative forfeiture of property to which he made no claim. The issue posed is whether the Double Jeopardy Clause of the United States Constitution is implicated. This determination is grounded in the facts of the particular case, as well as the nature of the law under which the sanctions were imposed.

In drafting the initial version of what came to be the Double Jeopardy Clause, James Madison focused explicitly on the issue of multiple punishment. He stated "No person shall be subject, except in cases of impeachment, to more than

one punishment or one trial for the same offense." United States v. Halper, 490 U.S. 435, 440 citing 1 Annals of Cong. 434 (1789-91) (Gales Ed. 1934).[2] The Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense. In Re Kurth Ranch, 986 F.2d 1308, 1310 (9th Cir. 1993), affirmed 114 S.Ct. 1937 (1994); United States v. Halper, 490 U.S. 435, 440 (1989). Plunk's motion implicates the third of these protections.

The multiple-punishment prohibition applies when the government attempts to criminally punish a defendant twice for the same offense. United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984). The clause does not bar the government from imposing both a civil and a criminal penalty upon a defendant for the same offense. Helvering v. Mitcheli, 303 U.S. 391 (1938). However, where the government seeks to impose not only a criminal sanction, but also a civil sanction in a separate proceeding that can be understood as punitive, the Double Jeopardy Clause is violated. See United States v. Halper, 490 435, 448 (1989); United States v. $405.089.23 U.S. Currency, 33 F.3d 1210 (9th Cir. 1994).[3]

To determine whether criminal prosecution violates the Fifth Amendment in light of the forfeiture proceedings, the court must consider two questions: Whether the criminal prosecution and the civil forfeiture actions constitute separate "proceedings," and whether civil forfeiture under 21 U.S.C. § 881(a)(6) constitutes "punishment." United States v.

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[2] Halper involved a medical doctor who had been convicted and punished under the Criminal False Claim statute, 18 U.S.C. § 287 for filing false MediCare claims. The court considered whether he could be fined for the same false claims under the civil provisions of the False Claims Act, 31 U.S.C. §§ 3729-3731. The court held that the Double Jeopardy Clause prevented it, to the extent that the fine exceeded what was needed to cover "legitimate non-punitive governmental objectives." 490 U.S. at 448.

[3] A Motion for Rehearing En Banc filed on or about October 20, 1994 is pending.

$405,089.23 U.S. Currency, 32 F.3d 1210, 1216 (9th Cir. 1984).

A. Separate Proceedings

The government's efforts in characterizing the proceedings as one coordinated prosecution fails under contemporary Ninth Circuit law. The government's characterization of a forfeiture as "administrative" does not preclude this conclusion. In the Ninth Circuit, parallel proceedings are separate proceedings, not the "same proceedings." $405,089.23 U.S. Currency, at 1216. In that case the Ninth Circuit relying on Jeffers v. United States, 432 U.S. 137 (1977) rejected the contrary view of the Second and Eleventh Circuits. "[A] civil forfeiture action which is brought and tried separately from a criminal prosecution and is based upon the same offense constitutes a separate 'proceeding'." $405,089.23 U.S. Currency, at 1218. In the instant case the forfeiture actions were before different fact-finders and different judges. Recently, a sister court concluded that the government's characterization of a forfeiture as "administrative" does not preclude this conclusion. Quinones-Riuz v. United States, 1994 WL 531313 (S.D.CA.)

B. Administrative Forfeitures As Punishment

Next, the court must determine whether any of the administrative forfeitures actions constitute "punishment." Administrative forfeitures have been declared as to the Rolex Watch, $9,660 in currency, gold nuggets and nine (9) firearms. No claims were filed in response to the Notice of Seizures for these properties. The government argues that the civil penalties imposed in these related administrative forfeiture actions, do not constitution [sic] "punishment" for the purpose of the Double Jeopardy Clause because judgment in the forfeiture proceedings was obtained by default and thus there is no showing that Plunk has been deprived of any of his property.

The government cannot seriously argue that the administrative forfeitures in this case do not refer to property associated with the criminal defendant. The search warrants authorized searches of Plunk's property; the seizure notices reference Plunk, and the underlying investigation; and the indictment ties the property to Plunk. The record shows that Plunk was arrested for conduct giving rise to the administrative seizures and forfeitures as well as the indictment. The government's evidence at the bail hearing linked some of the personal property forfeited to Plunk. The government wants the court to find that Plunk has not been "punished" through civil forfeitures because he was not a party to those proceedings. At the same time the government would deny him standing to assert a claim unless he waived his Fifth Amendment rights to assert standing. The government cannot have it both ways.

Plunk relies on the government's use of seized evidence at the bail hearing to illustrate that some of the property referenced in the administrative forfeiture actions is the same property and relates to the same offenses for which he is being prosecuted. At the bail hearing the government argued that Plunk was using the firearms and money to facilitate the underlying conspiracy to traffic in controlled substances. Plunk refers to the bail hearing to show the interplay of his right against self-incrimination in the civil forfeiture proceedings and in the criminal prosecution.

The government analogizes this situation to one where a defendant "successfully avoids adjudication of his guilt." "Jeopardy" does not focus upon the resulting adjudication, but rather upon the defendant's position of having to defend. The mere filing of an indictment does not create jeopardy; the government may dismiss the charge without prejudice to re-instituting further prosecution for the same charge.

The Supreme Court has recognized a common understanding that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties. 490 U.S. at 447. Under Halper it is the purpose actually served by the

sanction imposed on the individual not the underlying nature of the proceeding giving rise to the sanction that must be evaluated in determining whether a particular civil sanction constitutes criminal punishment. Id, n.7. The labels "criminal" and "civil" are not significant in determining whether a sanction constitutes punishment for double jeopardy purposes. $405,089.23 U.S. Currency, at 1218; Quinones-Ruiz v. United States, 1994 WL 531313 (S.D.CA.) (Forfeiture of convicted plaintiff's currency constituted a second punishment in violation of plaintiff's right under the Fifth Amendment to be free from double jeopardy). A legislature's description of a statute as civil does not foreclose the possibility that it has a punitive character for double jeopardy purposes. Department of Revenue of Montana v. Kurth Ranch, 114 S.Ct. 1937 (1994); Halper, supra. Under Halper, a sanction which is designed even in part to deter or punish will constitute punishment, regardless of whether it also has a remedial purpose. Austin v. United States, 113 S.Ct. 2801, 2806 (1993); $405,089.23 U.S. Currency, at 1219. "[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retribution or deterrent purposes, is punishment. . . ." Halper, 490 U.S. at 448.

The Supreme Court recognizes that statutory in rem forfeiture may impose punishment. Legislative history of 21 U.S.C. § 881 recognizes that "the traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs." Senate Report No. 98-225, p. 191 (1983). The constitutional protection against double jeopardy is intrinsically personal. Halper.

The Ninth Circuit affirmed the district court's denial of a motion to dismiss the indictment on the grounds of double jeopardy holding that forfeiture of property used to grow marijuana was not a double jeopardy bar to the prosecution. See United States v. McCaslin, 959 F.2d 786 (9th Cir. 1992), cert. denied 113 S.Ct. 382 (1992). The Ninth Circuit held that Halper had no application to the ancient practice by which instrumentalities of a crime may be declared forfeit to the

government. 959 F.2d at 788. Subsequently, the Ninth Circuit recognized in United States v. $405,089.23 U.S. Currency, that the Supreme Court in Austin rejected the McCaslin analysis. The Supreme Court stated:

> "In light of the historical understanding of forfeitures as punishment, the clear focus of §§ 881(a)(4) and (a)(7) on the culpability of the owner, and the evidence that Congress understood these provisions as serving to deter and to punish, we cannot conclude that forfeiture under §§ 881(a)(4) and (a)(7) serves solely a remedial purpose."

Austin, 113 S.Ct. at 2812, citing Halper, 490 U.S. at 448. See $405,089.23 U.S. Currency, 33 F.3d at 1219. Most recently, Judge Dwyer granted McCaslin's motion to vacate conviction and sentence under 28 U.S.C. § 2255 for the reason that the criminal sentence, imposed in a separate proceeding more than a year after judgment was entered forfeiting his residential real property under 21 U.S.C. § 881(a)(7), constituted a second punishment for the same offense in violation of the Double Jeopardy Clause. See United States v. Duane B. McCaslin, 1994 WL 494764 (W.D.WA. 1993).

Even though the forfeiture proceedings in the instant case were commenced before the Ninth Circuit rendered its opinion in $405,089.23 U.S. Currency, the Halper -- Austin analysis, provided the test to determine whether a civil forfeiture under 21 U.S.C. § 881 constituted "punishment." In Austin the Supreme Court employed the Halper test which it used to decide whether a civil monetary penalty constituted "punishment" for purposes of the Double Jeopardy Clause in determining whether the excessive fines clause applied. The Ninth Circuit in $405,089.23 U.S. Currency merely restates what the Supreme Court's decision in Austin made clear that Halper's double jeopardy protections apply to most civil forfeiture cases. The government was not free to ignore Austin but rather should have looked to the entire applicable statute to determine whether a forfeiture constitutes "punishment" rather than dwelling on the nature of the

property sought to be forfeited. Austin rejected a case-by-case approach to determine whether forfeiture constitutes "punishment." 113 S.Ct. at 2812, n.14.

The Austin court focused on 21 U.S.C. §§ 881(a)(4) and (a)(7). The court identified the punitive purpose of the sections on the culpability of the owner. Significant to the court was the fact that the statute expressly provided an innocent owner defense. It authorizes forfeiture only where the owner is himself involved in illegal activity. See Austin, 113 S.Ct. at 2810. The court noted that Congress has chosen to link forfeiture directly to the commission of drug offenses. Austin acknowledges the historical understanding of forfeiture as punishment. 113 S.Ct. at 2812.

Any doubt that the Austin analysis of what constitutes punishment applies as well under the Double Jeopardy Clause was made clear by the Supreme Court in Department of Revenue v. Kurth Ranch, 114 S.Ct. 1937 (1994). "A defendant convicted and punished for an offense may not have a non-remedial civil penalty imposed against him for the same offense in a separate proceeding." Id. at 1945.

The principles set forth in Austin lead to the conclusion in the instant case that the statutes relied upon by the government operate to punish and deter notwithstanding any remedial purpose that may be served. The government forfeited the U.S. Currency, placer gold and watch under 21 U.S.C. § 881(a)(6). This section provides:

> "(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> (6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property

> shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner."

The firearms were forfeited under 21 U.S.C. § 881(a)(11) which provides in pertinent part:

> "Any firearm (as defined in § 921 of Title 18) used or intended to be used to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2) and any proceeds traceable to such property."

Authority for administrative forfeiture of the items pursuant to 21 U.S.C. § 881 is found at 19 U.S.C. § 1609. These forfeitures have the same force and effect as a contested civil judicial forfeiture. 19 U.S.C. § 1609(b). A contested trial is not necessary. See Kurth Ranch, 114 S.Ct. at 1492.

It is clear that jeopardy is complete when a judgment is entered. Id. at 1942. No judgment has been tendered in Case No. A94-401 Civil seeking the forfeiture of the four airplanes. Because the administrative forfeitures "resulted in punishment" it is unnecessary for the court to determine whether jeopardy has attached in Case No. A94-401 Civil, the civil forfeiture action against the airplanes.[4] It is likewise unnecessary to address Plunk's contention that the government purposely instituted the forfeiture proceedings to gain advantage by "splitting" the prosecution of Plunk into the civil punishment proceedings and criminal punishment proceedings.

---

[4] Plunk contends that the mere filing of a forfeiture claim impacts his Fifth Amendment privileges and thereby constitutes jeopardy.

CONCLUSION

The administrative forfeitures of Plunk's Rolex watch, currency, placer gold and nine (9) firearms constitute "punishment" in a separate proceeding for double jeopardy purposes. Under Ninth Circuit law this court must conclude that the legislative history of the relevant statutes allowing the forfeitures show a Congressional intent to punish and deter, and they do not serve solely a remedial purpose.

The development of law in this area has arguably led to unintended results in the administration of justice. This court is bound to follow the Ninth Circuit law. It is up to the Supreme Court and Congress to provide clear direction in this quagmire. Accordingly, it is recommended that Defendant Plunk's Motion to Dismiss the Indictment on Grounds of Double Jeopardy be Granted.

DATED this 4th day of November, 1994, at Anchorage, Alaska.

/S/

JOHN D. ROBERTS
United States Magistrate Judge

Pursuant to Local Magistrate Rule 12(C), a party seeking to object to this proposed finding and recommendation shall file written objections with the Clerk of Court no later than the close of business on **NOVEMBER 9, 1994**. The failure to object to a magistrate judge's findings of fact may be treated as a procedural default and waiver of the right to contest those findings on appeal. McCall v. Andrus, 628 F.2d 1185, 1187-1189 (9th Cir.), cert. denied, 450 U.S. 996 (1981). Objections and responses shall not exceed five (5) pages in length, and shall not merely reargue positions presented in motion papers. Rather,

objections and responses shall specifically designate the findings or recommendations objected to, the basis of the objection, and the points and authorities in support. Response(s) to the objections shall be filed on or before **NOVEMBER 14, 1994**. The parties shall otherwise comply with provisions of Local Rule 12 (C).

Reports and recommendations are not appealable orders. Any notice of appeal pursuant to Fed.R.App.P. 4(a)(1) should not be filed until entry of the district court's judgment. See Hilliard v. Kincheloe, 796 F.2d 308 (9th Cir. 1986).

Phillip Paul Weidner
Phillip Paul Weidner & Associates, Inc.
330 "L" Street, Suite 200
Anchorage, Alaska 99501
(907) 276-1200

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Case No. A94-0036
	)	CR (JWS)
vs.	)	
	)	
GERALD FRANK PLUNK, et al.,	)	
	)	
Defendants.	)	
	)	

AFFIDAVIT OF GERALD FRANK PLUNK IN SUPPORT OF MOTION FOR ORDER BARRING FURTHER PROSECUTION ON GROUNDS OF DOUBLE JEOPARDY

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

GERALD FRANK PLUNK, being first duly sworn under oath, deposes and states:

1. I voluntarily surrendered myself in the instant criminal matter on or about March 25, 1994 and was arrested.

2. At the time of my arrest I was wearing a Rolex watch which, upon information and belief, is the

watch the subject of Seizure No. 152090, Case No. RG940002.

3. I was initially told by the marshals that I could remove my watch and give it to my attorney, Mr. Bryson.

4. The watch was then taken by a DEA agent.

5. After repeated inquiries by me and/or my attorney concerning said watch, I received notice of administrative forfeiture of the watch.

6. I further received notice of administrative seizures 152199, 152824, and 152183 with regard to certain currency, gold and guns allegedly seized from my residence, and upon the advice of my counsel, pursuant to my concerns and my attorney's concerns of the impact on my defense in the underlying criminal charges, I did not file formal claims at the administrative level given the advice of counsel and my concerns as they related to allegations made by the government in the superseding indictment and at the bail hearing and otherwise with regard to the significance of said items, namely, to the effect that admitting formal ownership and possession of said items might tend to incriminate me within the meaning of the Fifth Amendment of the United States Constitution, as to the criminal charges in this case.

FURTHER AFFIANT SAYETH NAUGHT.

/S/

_____

Gerald Frank Plunk

SUBSCRIBED AND SWORN TO before me, the undersigned, a Notary Public in and for the State of Alaska, duly commissioned as such, this 2nd day of November, 1994.

/S/

_____

Notary Public in and for the
State of Alaska
My Commission Expires: ___

Phillip Paul Weidner
Phillip Paul Weidner & Associates, Inc.
330 "L" Street, Suite 200
Anchorage, Alaska 99501
(907) 276-1200

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Case No. A94-0036 CR (JWS)
	)	
vs.	)	
	)	
GERALD FRANK PLUNK, et al.,	)	
	)	
Defendants.	)	
	)	

AFFIDAVIT OF GERALD FRANK PLUNK IN SUPPORT OF MOTION FOR ORDER BARRING FURTHER PROSECUTION ON GROUNDS OF DOUBLE JEOPARDY

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

GERALD FRANK PLUNK, being first duly sworn under oath, deposes and states:

1. I am the defendant in United States v. Plunk, Case No. A94-036 (JWS).

2. I am tendering this affidavit in support of my Motion to Bar Further Prosecution on the Grounds of Double Jeopardy.

3. By tendering this affidavit, I do not intend to make any limited or general waiver of my right to remain silent or against self-incrimination under the United

States constitution or my rights to confidentiality of attorney/client communications.

4. It is my knowledge and belief that pursuant to the search warrant executed on my personal residence at 14940 Longbow Drive, Anchorage, Alaska, nine firearms were seized.

5. I obtained the following seized firearms from individuals who the government has informed me are cooperating witnesses in the case against me:

a. Ruger 22 mm: gift from David Nova.

b. Colt 45: purchased from Hal Booher.

6. I purchased the Wilding 475 pistol through my son-in-law, Michael Frizzell.

FURTHER AFFIANT SAYETH NAUGHT.

/S/

_____

Gerald Frank Plunk

SUBSCRIBED AND SWORN TO before me, the undersigned, a Notary Public in and for the State of Alaska, duly commissioned as such, this 2nd day of November, 1994.

/S/

_____

Notary Public in and for the
State of Alaska
My Commission Expires: ___

Phillip Paul Weidner
Phillip Paul Weidner & Associates, Inc.
330 "L" Street, Suite 200
Anchorage, Alaska 99501
(907) 276-1200

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Case No. A94-0036 CR (JWS)
	)	
vs.	)	
	)	
GERALD FRANK PLUNK, et al.,	)	
	)	
Defendants.	)	

AFFIDAVIT OF COUNSEL IN SUPPORT OF DEFENDANT PLUNK'S MOTION FOR ORDER BARRING FURTHER PROSECUTION ON GROUNDS OF DOUBLE JEOPARDY

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

PHILLIP PAUL WEIDNER, being first duly sworn under oath, deposes and states:

1. I am the attorney of record for the defendant Gerald Frank Plunk in the instant matter.

2. This affidavit is submitted in support of the defendant's pending Motion for Order Barring Further Prosecution on Grounds of Double Jeopardy/Notice of Objection on Double Jeopardy Grounds to Further

Proceedings and/or Jury Trial, and is not intended or made as any limited or general waiver of his rights to remain silent and against self-incrimination under the United States Constitution, or his rights to confidentiality of attorney/client privileges under same.

3. I was Mr. Plunk's attorney of record at the time of the return of the superseding indictment herein, and further, his attorney of record at the time of two detention hearings, and further, reviewed a transcript of the initial detention hearing held when Mr. Plunk was previously represented by William P. Bryson.

4. I was attorney of record for Mr. Plunk in the instant matter when he was served with and brought to my attention notice of seizures in Seizure Nos. 1521831, 152199, and 152824 relating to items allegedly seized from his alleged residence at 14940 Long Bow Drive, Anchorage, Alaska at the time of service of a search warrant herein.

5. Based upon my understanding of the government's allegations in the indictment and informal and/or formal discovery herein, including the fact that they were alleging that there was a critical "heat sealing" or "vacuum sealing" "food saving" machine which was allegedly discovered in a cocaine conspiracy case on the East Coast that had allegedly been used to package money and the fact that said machine was allegedly traced to a purchase by Mr. Plunk, and further my understanding that certain of the items the subject of the above-referenced seizures (i.e. the guns, gold, and currency, Seizure Nos. 152199, 152824, and 1521831) related to ownership and/or possession of currency allegedly seized at Mr. Plunk's residence (including Search Warrant No. A94-0049 MJ, inventory nos. N-127, N-109, and N-112), and further based upon my understanding that the government was alleging that certain sales of drugs had been made out of that residence by Mr. Plunk to a cooperating witness, and further, based upon my understanding of the federal sentencing and substantive laws with regard to firearms and controlled substances, and further, based upon my understanding of the government's allegations and evidence and the court's findings at the bail/detention hearing, I advised Mr. Plunk that in order to protect his rights against self-incrimination and to not prejudice his defense with regard

to the criminal charges in the underlying superseding indictment that he should not file a formal claim at the administrative level with regard to said seizures. This advice was further based upon my understanding of the government's position and/or case law with regard to attempts to preserve Fifth Amendment privileges while litigating administrative and civil forfeitures brought by the government as a result of alleged controlled substance activities.

FURTHER AFFIANT SAYETH NAUGHT.

/S/

Phillip Paul Weidner

SUBSCRIBED AND SWORN TO before me, the undersigned, a Notary Public in and for the State of Alaska, duly commissioned as such, this 2nd day of November, 1994.

/S/

Notary Public in and for the
State of Alaska
My Commission Expires: 7/25/97

U.S. Department of Justice
Drug Enforcement Administration

Seizure #: 152824 Case #: RG940002
PROP: PLACER GOLD, 3 SMALL PLASTIC BAGS
ID#:
VALUE: $967.89
SEIZURE DATE: 24 MAR 94
SEIZURE PLACE: ANCHORAGE, AK
OWNER: PLUNK, GERALD FRANK
SEIZED FROM: PLUNK, GERALD FRANK, INMATE
JUDICIAL DIST: ALASKA

DATE:
AUGUST 19, 1994

DECLARATION FOR FORFEITURE

The above-described property has been seized by agents of the DRUG ENFORCEMENT ADMINISTRATION pursuant to 21 U.S.C. 881. Notice of a seizure has been sent to all known parties who may have a legal or possessory interest in the property. Also, in accordance with 19 U.S.C. 1607, notice of the seizure has been published and no claims have been filed for the property within 20 days from the date of first publication of the advertisement. THEREFORE, it is hereby declared that such property is forfeited to the United States pursuant to 19 U.S.C. 1609.

/S/
Senior Attorney
Office of Chief Counsel
Asset Forfeiture Section

cc: DEA/DO: SEATTLE, WASHINGTON
DEA/RO: ANCHORAGE, ALASKA
USMS: ANCHORAGE, ALASKA
BY: AEB AD CODE #: 244

DEA.294 (MAR.92)

U.S. Department of Justice
Drug Enforcement Administration

Seizure #: 152199 Case #: RG940002
PROP: $9,660.00 U.S. CURRENCY
ID#:
VALUE: $9660.00
SEIZURE DATE: 24 MAR 94
SEIZURE PLACE: ANCHORAGE, AK
OWNER: PLUNK, GERALD FRANK, INMATE NO.:
SEIZED FROM: PLUNK, GERALD FRANK
JUDICIAL DIST: ALASKA

DATE:
JUNE 24, 1994

DECLARATION FOR FORFEITURE

The above-described property has been seized by agents of the DRUG ENFORCEMENT ADMINISTRATION pursuant to 21 U.S.C. 881. Notice of a seizure has been sent to all known parties who may have a legal or possessory interest in the property. Also, in accordance with 19 U.S.C. 1607, notice of the seizure has been published and no claims have been filed for the property within 20 days from the date of first publication of the advertisement. THEREFORE, it is hereby declared that such property is forfeited to the United States pursuant to 19 U.S.C. 1609.

/S/
Senior Attorney
Office of Chief Counsel
Asset Forfeiture Section

cc: DEA/DO: SEATTLE, WASHINGTON
DEA/RO: ANCHORAGE, ALASKA
USMS: ANCHORAGE, ALASKA
BY: AEB AD CODE #: 244

DEA.294 (MAR.92)

U.S. Department of Justice
Drug Enforcement Administration

Seizure #: 152183 Case #: RG940002
PROP: 9 ASSORTED WEAPONS
ID#:
VALUE: $4040.00
SEIZURE DATE: 24 MAR 94
SEIZURE PLACE: ANCHORAGE, AK
OWNER: PLUNK, GERALD F.
SEIZED FROM: PLUNK, FRANK INMATE #760
JUDICIAL DIST: ALASKA

DATE:
JUNE 10, 1994

DECLARATION FOR FORFEITURE

The above-described property has been seized by agents of the DRUG ENFORCEMENT ADMINISTRATION pursuant to 21 U.S.C. 881. Notice of a seizure has been sent to all known parties who may have a legal or possessory interest in the property. Also, in accordance with 19 U.S.C. 1607, notice of the seizure has been published and no claims have been filed for the property within 20 days from the date of first publication of the advertisement. THEREFORE, it is hereby declared that such property is forfeited to the United States pursuant to 19 U.S.C. 1609.

/S/
Senior Attorney
Office of Chief Counsel
Asset Forfeiture Section

cc: DEA/DO: SEATTLE, WASHINGTON
DEA/RO: ANCHORAGE, ALASKA
USMS: ANCHORAGE, ALASKA
BY: AEB AD CODE #: 242

DEA.294 (MAR.92)

U.S. Department of Justice
Drug Enforcement Administration

Seizure #: 152090 Case #: RG940002
PROP: ROLEX WRIST WATCH, ROLEX OYSTER
ID#:
VALUE: $1500.00
SEIZURE DATE: 25 MAR 94
SEIZURE PLACE: ANCHORAGE, AK
OWNER: PLUNK, GERALD F.
SEIZED FROM: PLUNK, FRANK (INMATE #7603)
JUDICIAL DIST: ALASKA

DATE:
JUNE 3, 1994

DECLARATION FOR FORFEITURE

The above-described property has been seized by agents of the DRUG ENFORCEMENT ADMINISTRATION pursuant to 21 U.S.C. 881. Notice of a seizure has been sent to all known parties who may have a legal or possessory interest in the property. Also, in accordance with 19 U.S.C. 1607, notice of the seizure has been published and no claims have been filed for the property within 20 days from the date of first publication of the advertisement. THEREFORE, it is hereby declared that such property is forfeited to the United States pursuant to 19 U.S.C. 1609.

/S/
Senior Attorney
Office of Chief Counsel
Asset Forfeiture Section

cc: DEA/DO: SEATTLE, WASHINGTON
DEA/RO: ANCHORAGE, ALASKA
USMS: ANCHORAGE, ALASKA
BY: AEB AD CODE #: 241

DEA.294 (MAR.92)

U.S. DEPARTMENT OF JUSTICE
Drug Enforcement Administration

Seizure #: 152199 Case #: RG940002
PROP: $9,660.00 U.S. CURRENCY

VALUE: $9660.00
SEIZURE DATE: 94 MAR 24 152199
SEIZURE PLACE: ANCHORAGE, AK

SZD FROM: PLUNK, GERALD FRANK
OWNER: *
JUDICIAL DIST: ALASKA
BOND REQUIRED: $966 152199
DATE OF THIS LETTER: 09 MAY 94
DATE OF FIRST PUBLICATION: 94 MAY 18

PLUNK, GERALD FRANK
14940 LONGBOW DR
ANCHORAGE
AK 99516
152199B

NOTICE OF SEIZURE

The above-described property was seized by Special Agents of the Drug Enforcement Administration (DEA) for forfeiture under Title 21, United States Code (U.S.C.), Section 881, because it was used or acquired as a result of a **drug-related offense**. (See Title 21, Code of Federal Regulations (C.F.R.), Section 1316.91(d) (54 Federal Register 37610-37611) for the definition of the term "drug-related offense.") The seizure date and place, as well as other pertinent information regarding the property are also shown above. Pursuant to Title 19, U.S.C., Sections 1602-1619, and Title 21, C.F.R. Sections 1316.71-1316.81, procedures to administratively forfeit this property are under way. You may petition the DEA for the return of the property or your interest in it (remission or mitigation), and/or you may contest the seizure and forfeiture of the property in **court**. Also, under

certain circumstances, you may petition for the expedited release of the property. **You should review the following procedures very carefully.**

TO REQUEST REMISSION OR MITIGATION OF THE FORFEITURE

If you want to request the remission (pardon) or mitigation of the forfeiture, submit a petition for remission or mitigation within thirty (30) days from your receipt of this notice. Follow the regulations set forth in Title 28, C.F.R., Sections 9.1-9.7. State the facts and circumstances which you believe justify return of the property or return of your interest in the property. File an original petition and two copies with the DEA's Asset Forfeiture Section. No bond is necessary if only a petition is filed. **Pursuant to Title 28, C.F.R., Section 9.4(c), a petition for remission or mitigation for forfeiture shall be signed and sworn to by the petitioner.**

TO CONTEST THE FORFEITURE

In addition to or in lieu of petitioning for remission or mitigation, you may contest the forfeiture of the seized property in UNITED STATES DISTRICT COURT. To do so, you must file a claim of ownership and cost bond with the DEA. Submit the bond in the amount shown above in the form of a cashier's check or a certified check payable to the U.S. Department of Justice, or present satisfactory surety. **Claims must be signed by the parties making the claim**. Unsupported submissions signed by attorneys are insufficient to satisfy the requirement the claims be personally executed. United States v. Fifteen Thousand Five Hundred Dollars, 558 F.2d 1359, 1360 (9th Cir. 1977).

If you are indigent (needy and poor) you may not have to post the bond. To request a waiver of the bond, you must fully disclose your finances in a signed statement called a "Declaration in Support of Request to Proceed *In Forma Pauperis*" along with a claim of ownership of the property. Use the format of the *pauperis* declaration shown as Form 4 in the Appendix of Forms following Rule 48 of the Federal Rules of Appellate Procedure or obtain a form from a DEA

field office. The claim of ownership, with either bond or the "Declaration in Support of Request to Proceed *In Forma Pauperis*" must be filed within **twenty (20) days** of the **first date** of publication of the notice of seizure in the edition of the USA Today newspaper referenced above. The notice will be published three successive weeks.

U.S. DEPARTMENT OF JUSTICE
Drug Enforcement Administration

Seizure #: 152824 Case #: RG940002
PROP: PLACER GOLD, VALUE: $967.89

VALUE: $967.89
SEIZURE DATE: 94 MAR 24 152824B
SEIZURE PLACE: ANCHORAGE, AK

SZD FROM: PLUNK, GERALD FRANK
OWNER:
JUDICIAL DIST: ALASKA
BOND REQUIRED: $250
DATE OF THIS LETTER: 09 MAY 94 152824B
DATE OF FIRST PUBLICATION: 94 MAY 18

PLUNK, GERALD FRANK
14940 LONGBOW DR
ANCHORAGE
AK 99516
152824B

NOTICE OF SEIZURE

The above-described property was seized by Special Agents of the Drug Enforcement Administration (DEA) for forfeiture under Title 21, United States Code (U.S.C.), Section 881, because it was used or acquired as a result of a **drug-related offense**. (See Title 21, Code of Federal Regulations (C.F.R.), Section 1316.91(d) (54 Federal Register 37610-37611) for the definition of the term "drug-related offense.") The seizure date and place, as well as other pertinent information regarding the property are also shown above. Pursuant to Title 19, U.S.C., Sections 1602-1619, and Title 21, C.F.R. Sections 1316.71-1316.81, procedures to administratively forfeit this property are under way. You may petition the DEA for the return of the property or your interest in it (remission or mitigation), and/or you may contest the seizure and forfeiture of the property in **court**. Also, under

certain circumstances, you may petition for the expedited release of the property. **You should review the following procedures very carefully.**

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If you want to request the remission (pardon) or mitigation of the forfeiture, submit a petition for remission or mitigation within thirty (30) days from your receipt of this notice. Follow the regulations set forth in Title 28, C.F.R., Sections 9.1-9.7. State the facts and circumstances which you believe justify return of the property or return of your interest in the property. File an original petition and two copies with the DEA's Asset Forfeiture Section. No bond is necessary if only a petition is filed. **Pursuant to Title 28, C.F.R., Section 9.4(c), a petition for remission or mitigation for forfeiture shall be signed and sworn to by the petitioner.**

TO CONTEST THE FORFEITURE

In addition to or in lieu of petitioning for remission or mitigation, you may contest the forfeiture of the seized property in UNITED STATES DISTRICT COURT. To do so, you must file a claim of ownership and cost bond with the DEA. Submit the bond in the amount shown above in the form of a cashier's check or a certified check payable to the U.S. Department of Justice, or present satisfactory surety. **Claims must be signed by the parties making the claim**. Unsupported submissions signed by attorneys are insufficient to satisfy the requirement the claims be personally executed. United States v. Fifteen Thousand Five Hundred Dollars, 558 F.2d 1359, 1360 (9th Cir. 1977).

If you are indigent (needy and poor) you may not have to post the bond. To request a waiver of the bond, you must fully disclose your finances in a signed statement called a "Declaration in Support of Request to Proceed *In Forma Pauperis*" along with a claim of ownership of the property. Use the format of the *pauperis* declaration shown as Form 4 in the Appendix of Forms following Rule 48 of the Federal Rules of Appellate Procedure or obtain a form from a DEA

field office. The claim of ownership, with either bond or the "Declaration in Support of Request to Proceed *In Forma Pauperis*" must be filed within **twenty (20) days** of the **first date** of publication of the notice of seizure in the edition of the USA Today newspaper referenced above. The notice will be published three successive weeks.

U.S. DEPARTMENT OF JUSTICE
Drug Enforcement Administration

Seizure #: 152183 Case #: RG940002
PROP: 9 ASSORTED WEAPONS, VALUE: $4,040.00

VALUE: $4040.00
SEIZURE DATE: 94 MAR 24 152183B
SEIZURE PLACE: ANCHORAGE, AK

SZD FROM: PLUNK, GERALD FRANK
OWNER:
JUDICIAL DIST: ALASKA
BOND REQUIRED: $404
DATE OF THIS LETTER: 25 APR 94 152183B
DATE OF FIRST PUBLICATION: 94 MAY 04

PLUNK, GERALD FRANK
14940 LONGBOW DR
ANCHORAGE
AK 99516
152183B

NOTICE OF SEIZURE

The above-described property was seized by Special Agents of the Drug Enforcement Administration (DEA) for forfeiture under Title 21, United States Code (U.S.C.), Section 881, because it was used or acquired as a result of a **drug-related offense**. (See Title 21, Code of Federal Regulations (C.F.R.), Section 1316.91(d) (54 Federal Register 37610-37611) for the definition of the term "drug-related offense.") The seizure date and place, as well as other pertinent information regarding the property are also shown above. Pursuant to Title 19, U.S.C., Sections 1602-1619, and Title 21, C.F.R. Sections 1316.71-1316.81, procedures to administratively forfeit this property are under way. You may petition the DEA for the return of the property or your interest in it (remission or mitigation), and/or you may contest the

seizure and forfeiture of the property in **court**. Also, under certain circumstances, you may petition for the expedited release of the property. **You should review the following procedures very carefully.**

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If you want to request the remission (pardon) or mitigation of the forfeiture, submit a petition for remission or mitigation within thirty (30) days from your receipt of this notice. Follow the regulations set forth in Title 28, C.F.R., Sections 9.1-9.7. State the facts and circumstances which you believe justify return of the property or return of your interest in the property. File an original petition and two copies with the DEA's Asset Forfeiture Section. No bond is necessary if only a petition is filed. **Pursuant to Title 28, C.F.R., Section 9.4(c), a petition for remission or mitigation for forfeiture shall be signed and sworn to by the petitioner.**

TO CONTEST THE FORFEITURE

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If you are indigent (needy and poor) you may not have to post the bond. To request a waiver of the bond, you must fully disclose your finances in a signed statement called a "Declaration in Support of Request to Proceed *In Forma Pauperis*" along with a claim of ownership of the property. Use the format of the *pauperis* declaration shown as Form 4 in the Appendix of Forms following Rule 48 of the Federal

Rules of Appellate Procedure or obtain a form from a DEA field office. The claim of ownership, with either bond or the "Declaration in Support of Request to Proceed *In Forma Pauperis*" must be filed within **twenty (20) days** of the **first date** of publication of the notice of seizure in the edition of the USA Today newspaper referenced above. The notice will be published three successive weeks.

U.S. DEPARTMENT OF JUSTICE
Drug Enforcement Administration

Seizure #: 152090 Case #: RG940002
PROP: 1 ROLEX WRIST WATCH, VALUE: $1,500.00
SERIAL'S #9378785, #168000
VALUE: $1500.00
SEIZURE DATE: 94 MAR 25 152090B
SEIZURE PLACE: ANCHORAGE, AK

SZD FROM: PLUNK, GERALD FRANK
OWNER:
JUDICIAL DIST: ALASKA
BOND REQUIRED: $250
DATE OF THIS LETTER: 18 APR 94 152090B
DATE OF FIRST PUBLICATION: 94 APR 27

PLUNK, GERALD FRANK
14940 LONGBOW DR
ANCHORAGE
AK 99516
152090B

NOTICE OF SEIZURE

The above-described property was seized by Special Agents of the Drug Enforcement Administration (DEA) for forfeiture under Title 21, United States Code (U.S.C.), Section 881, because it was used or acquired as a result of a **drug-related offense**. (See Title 21, Code of Federal Regulations (C.F.R.), Section 1316.91(d) (54 Federal Register 37610-37611) for the definition of the term "drug-related offense.") The seizure date and place, as well as other pertinent information regarding the property are also shown above. Pursuant to Title 19, U.S.C., Sections 1602-1619, and Title 21, C.F.R. Sections 1316.71-1316.81, procedures to administratively forfeit this property are under way. You may petition the DEA for the return of the property or your interest in it (remission or mitigation), and/or you may contest the

seizure and forfeiture of the property in **court**. Also, under certain circumstances, you may petition for the expedited release of the property. **You should review the following procedures very carefully.**

TO REQUEST REMISSION OR MITIGATION OF THE FORFEITURE

If you want to request the remission (pardon) or mitigation of the forfeiture, submit a petition for remission or mitigation within thirty (30) days from your receipt of this notice. Follow the regulations set forth in Title 28, C.F.R., Sections 9.1-9.7. State the facts and circumstances which you believe justify return of the property or return of your interest in the property. File an original petition and two copies with the DEA's Asset Forfeiture Section. No bond is necessary if only a petition is filed. **Pursuant to Title 28, C.F.R., Section 9.4(c), a petition for remission or mitigation for forfeiture shall be signed and sworn to by the petitioner.**

TO CONTEST THE FORFEITURE

In addition to or in lieu of petitioning for remission or mitigation, you may contest the forfeiture of the seized property in UNITED STATES DISTRICT COURT. To do so, you must file a claim of ownership and cost bond with the DEA. Submit the bond in the amount shown above in the form of a cashier's check or a certified check payable to the U.S. Department of Justice, or present satisfactory surety. **Claims must be signed by the parties making the claim**. Unsupported submissions signed by attorneys are insufficient to satisfy the requirement the claims be personally executed. United States v. Fifteen Thousand Five Hundred Dollars, 558 F.2d 1359, 1360 (9th Cir. 1977).

If you are indigent (needy and poor) you may not have to post the bond. To request a waiver of the bond, you must fully disclose your finances in a signed statement called a "Declaration in Support of Request to Proceed *In Forma Pauperis*" along with a claim of ownership of the property. Use the format of the *pauperis* declaration shown as Form 4 in the Appendix of Forms following Rule 48 of the Federal

Rules of Appellate Procedure or obtain a form from a DEA field office. The claim of ownership, with either bond or the "Declaration in Support of Request to Proceed *In Forma Pauperis*" must be filed within **twenty (20) days** of the **first date** of publication of the notice of seizure in the edition of the USA Today newspaper referenced above. The notice will be published three successive weeks.

ROBERT C. BUNDY
UNITED STATES ATTORNEY

SUZANNE C. HAYDEN
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Federal Building & U.S. Courthouse
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FILED
Apr 26 1994
U.S. DISTRICT COURT
DISTRICT OF ALASKA
By _____ Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)
	) Case No. A94-036 CR
Plaintiff,	) **COUNT 1**
	) **CONSPIRACY TO**
vs.	) **DISTRIBUTE**
	) **COCAINE**
GERALD FRANK PLUNK, aka "FRANK", aka "EL FEO" AND TIMOTHY PIERSON, aka "TIM" aka "MR. T."	) Vio. Title 21 U.S.C. §841(a)(1) and 846
	)
	) **COUNT 2**
	) **CONTINUING**
	) **CRIMINAL**
Defendants.	) **ENTERPRISE**
	) Vio. Title 21 U.S.C. §848
	COUNT 3-8
	USE OF COMMUNICATION FACILITY
	Vio. Title 21 U.S.C. § 843(b)

COUNT 9-11
POSSESSION WITH INTENT TO DISTRIBUTE
Vio. Title 21 U.S.C. § 841(a)(1)

COUNT 12
CONSPIRACY TO DISTRIBUTE COCAINE
Vio. Title 21 U.S.C. § 846 and 841(a)(1)

SUPERSEDING INDICTMENT

THE GRAND JURY CHARGES THAT:

COUNT 1

Beginning on or about April 1, 1993, and continuing until on or about December 31, 1993, in the State and Federal of Alaska [sic] and elsewhere,

GERALD FRANK PLUNK
aka "FRANK"
aka EL FEO
AND
TIMOTHY PIERSON
aka "TIM"
aka "MR. T."

the defendants herein, and other persons whose names are known and unknown to the grand jury, did knowingly and intentionally combine, conspire, confederate and agree to commit offenses against the United States, that is to distribute in excess of 2000 kilograms of cocaine, a Schedule II Controlled Substance, in violation of Title 21 U.S.C. § 841(a)(1) and 846.

A.. **OBJECTIVES OF THE ORGANIZATION**

1. One objective of the organization was the possession of controlled substances (cocaine) with the intent to distribute the cocaine within the United States.

2. Another objective of the organization was the transportation of loads of cocaine from the Los Angeles, California and the Houston, Texas areas to New Jersey on behalf of the Colombian Cali Cartel.

3. The primary objective of the organization was the distribution of multi-kilogram loads of cocaine for financial gain.

B. **THE PARTICIPANTS IN THE ORGANIZATION**

The organization consisted of numerous individuals aligned in various sub-groups all working toward the common objective of distributing cocaine for financial gain.

1. JACO, aka EL COMPADRE, a Colombian National living in Colombia was the principal organizer, supervisor and manager of the organization. His job was the transportation of cocaine into the United States and the ultimate supervision of the distribution of the cocaine throughout the United States.

2. LEON ALBERTO MALCA, aka JAMES, aka RICKI (hereinafter JAMES) (charged elsewhere) was a principal supervisor in New York who coordinated the Colombian and North American distribution of multi-kilo loads of cocaine.

3. GERALD FRANK PLUNK, aka FRANK, aka FEO, (hereinafter PLUNK) was the principal organizer, supervisor and manager of the interstate transportation of multi-kilo loads of cocaine. He was responsible for establishing a transportation network from the Southern borders of the United States to the New Jersey area.

4. JOHN TIMOTHY PIERSON, aka MR. T., (hereinafter PIERSON) was initially a driver for PLUNK but later became responsible for the transportation network when law enforcement began investigating PLUNK.

5. Tony, aka, Alphonse, supervised the storage of cocaine in Los Angles [sic], California.

6. CARLOS ANDRES SERRATO (charged elsewhere) and MIGUEL ANGEL VILLALKA (charged elsewhere) delivered vehicles loaded with cocaine to predesignated locations to be off-loaded by the drivers initiating their cross-country travel.

7. ELBA DUENAS, aka ERICA (charged elsewhere) delivered empty vehicles from New York to predesignated locations in New Jersey to enable cross-country drivers to off-load their cocaine shipments into the vehicles. She sometimes delivered cocaine proceeds to BARRY TENDLER.

8. BARRY TENDLER aka THE BEAR, (charged elsewhere) assisted PLUNK in the delivery of cocaine to drivers in Los Angeles and participated in the distribution of payments to the drivers and the receipt of drug proceeds.

9. HAL BOOHER aka PANCHO (charged elsewhere) was an interstate driver who utilized a trailer and a motorhome to transport approximately 1225 kilos of cocaine between Los Angeles, Houston, and New Jersey.

10. CISCO and D.D., unindicted co-conspirators, were interstate drivers hired by PLUNK to transport approximately 1775 kilos of cocaine from Los Angeles and Houston to New Jersey, utilizing motorhomes and trucks.

C. **METHODS AND MEANS**

1. It was a part of the conspiracy that the participants of the organization employed code names, and communicated by code through the use of Sky Talk and Sky Page and cellular phones to avoid detection by law enforcement as they communicated their cocaine transportation messages.

2. It was a part of the conspiracy to use recreational-type vehicles to transport kilo loads of cocaine across country.

3. It was a part of the conspiracy that PLUNK would provide the currency to purchase the vehicles used for transporting cocaine.

4. It was a further part of the conspiracy to disguise the true nature of cross-country trips by having the drivers pass out brochures and video tapes describing

defendant PLUNK's "BIG MOUNTAIN LODGE" located near Illiamna, Alaska.

5. It was a part of the conspiracy that after being told where to begin the journey, the drivers would load boxes or duffel bags of cocaine into waiting vehicles and travel across the United States to New Jersey.

6. It was a part of the conspiracy that upon arrival in New Jersey, drivers were notified that certain empty vehicles were waiting to be filled with the cocaine.

7. It was a further part of the conspiracy that throughout the journey and upon its completion, the drivers communicated by telephone and pager with defendant PLUNK who informed James of their progress.

8. It was a part of the conspiracy that El Compadre in Colombia would speak directly to James about the transactions, and that James would repeat portions of their conversations to PLUNK and that James would repeat similar conversations of PLUNK's to El Compadre.

9. It was a part of the conspiracy that PLUNK would purchase commercial heat sealing machines through BIG MOUNTAIN LODGE and distribute them to the Colombians for the purpose of packaging proceeds (cash) from the distribution of cocaine.

10. It was a further part of the conspiracy that PLUNK would often pay drivers with vacuum packed envelopes of cash.

11. It was further part of the conspiracy that defendant PIERSON was to assume the role of transportation supervisor of the cocaine distribution when James and PLUNK feared the police were investigating PLUNK.

12. Finally, it was a part of the conspiracy that drivers were instructed how to avoid detection on their cross-country trips and instructed that they would be provided a "family doctor" (signifying a lawyer) in the event they were arrested.

D. **OVERT ACTS**

In furtherance of the conspiracy and to achieve the objects thereof the following over [sic] acts were committed:

1. On or about the first week of April 1993, PLUNK travelled [sic] to South America to meet with

members of the Cali Cartel to discuss transporting cocaine into Alaska as well as across the United States.

2. On or about April 15, 1993, PLUNK traveled to Seattle, Washington to hire a driver to transport cocaine.

3. On or about April 26, 1993, PLUNK purchased a motorhome in Eagle River, Alaska for the purpose of transporting cocaine.

4. On or about June 4, 1993, PLUNK and Tendler arrived in Los Angeles to assist in loading approximately 174 kilos of cocaine into a motorhome which was destined for New Jersey.

5. In or around early July, PLUNK directed Cisco, and Pancho to transport cocaine from Los Angeles to New Jersey.

6. On or about August 21, 1993, PLUNK directed an unindicted co-conspirator to transport approximately 200 kilos of cocaine from Houston, Texas to New Jersey.

7. On or about mid-September, PLUNK arranged for the transfer of ownership of a load vehicle used for transporting cocaine.

8. In or around early September, PLUNK directed Cisco to transport cocaine from Houston, Texas to New Jersey.

9. On or about October, 1993, PLUNK directed Pancho to transport approximately 200 kilos of cocaine from Houston, Texas to New Jersey.

10. In or around the middle of October, PLUNK directed Cisco to transport cocaine from Los Angeles to New Jersey.

11. In late October, PLUNK directed the transportation of approximately 100 kilos of cocaine from Los Angeles to New Jersey.

12. On or around Thanksgiving 1993, PLUNK directed Cisco, to transport a load of cocaine from Los Angeles to New Jersey in a Winnebago Motorhome.

13. On December 7, 1993, James telephoned PLUNK in Alaska to discuss Pancho's upcoming cocaine delivery as well as a delivery by defendant PIERSON.

14. On December 7, 1993, James telephoned Tony in California to discuss PLUNK and Pancho's upcoming arrival in Los Angeles.

15. On December 7, 1993 James telephoned Colombia to discuss "Panchito's" arrival.

16. On December 12, 1993, Pancho was arrested delivering 220 kilograms of cocaine to New Jersey.

17. On December 12, 1993, James telephoned Tony in Los Angeles and El Compadre in Colombia with news of Pancho's arrest.

18. On December 12, 1993, James telephoned PLUNK and discussed Pancho's arrest and discussed getting a lawyer for him.

19. On December 18, 1993, James telephoned Tendler to discuss Pancho's knowledge of the organization and getting a lawyer for him.

20. On December 18, 1993, James telephoned defendant PIERSON to discuss various locations for distributing cocaine, describing the organization to be like American Express . . . "everywhere".

All in violation of Title 21 U.S.C. § 841(a)(1) and 846.

COUNT 2

THE GRAND JURY FURTHER CHARGES THAT:

A. Beginning at a time unknown to the Grand Jury, but no later than April 1993, and continuing thereafter up to and including December 1993, in the State and Federal District of Alaska, and elsewhere,

GERALD FRANK PLUNK
AKA "FRANK"
AKA "EL FEO"

defendant herein, did knowingly, intentionally, and unlawfully engage in a Continuing Criminal Enterprise in that he did violate Title 21, United States Code, Sections 846, 841(a)(1) and 843(b), which violations, among others, were part of a continuing series of violations, included but not limited to, the following:

1. Beginning on or about April 1, 1993, and continuing until on or about December 31, 1993, in the State and Federal of Alaska [sic] and elsewhere,

GERALD FRANK PLUNK
AKA "FRANK"
AKA "EL FEO"

Defendant herein, did willfully and knowingly combine, conspire and agree with others whose names are known or unknown to the Grand Jury to distribute in excess of two thousand kilograms of cocaine and to possess with intent to distribute cocaine, as alleged in Count One of this Indictment, which is incorporated in full herein;

2. On or about June 4, 1993, defendant PLUNK did knowingly and intentionally distribute approximately 174 kilograms of cocaine, as alleged in Count 9 of this Indictment, which is incorporated in full herein;

3. On or about July, 1993, in the State and Federal District of Alaska, defendant PLUNK did knowingly and intentionally distribute approximately 350 kilograms of cocaine.

4. On or about August 21, 1993, defendant PLUNK did knowingly and intentionally distribute approximately 200 kilograms of cocaine as alleged in Count 10 of this Indictment which is incorporated in full herein;

5. On or about December 12, 1993, defendant PLUNK did knowingly and intentionally distribute approximately 220 kilograms of cocaine as alleged in Count 11 of this Indictment which is incorporated in full herein;

6. On or about December 7, 1993, defendant PLUNK did knowingly and intentionally use the telephone to further his drug trafficking activities as alleged in Count 3 of this Indictment, which is incorporated in full herein;

7. On or about December 5, 1993, defendant PLUNK did knowingly and intentionally use the telephone to further his drug trafficking activities as alleged in Count 4 of this Indictment, which is incorporated in full herein;

8. On or about December 8, 1993, defendant PLUNK did knowingly and intentionally use the telephone to further his drug trafficking activities as alleged in Count 5 of this Indictment, which is incorporated in full herein;

9. On or about December 11, 1993, defendant PLUNK did knowingly and intentionally use the telephone to further his drug trafficking activities, as alleged in Count 6 of this Indictment, which is incorporated in full herein;

Which series of violations were undertaken by defendant PLUNK in concert with at least five other persons with respect to whom defendant PLUNK occupied a position of organizer, a supervisory position, and other positions of management, and from which continuing series of violations defendant PLUNK obtained substantial income and resources.

B. **THE FORFEITURE PROVISIONS**

Through the above-mentioned continuing criminal enterprise, defendant

GERALD FRANK PLUNK
AKA "FRANK"
AKA "EL FEO"

his nominees, assignees, agents and those in active concert and participation with him did directly and indirectly obtain substantial profits, proceeds and resources from said criminal enterprise, which shall be forfeited to the United States of America pursuant to the provisions of Title 21 U.S.C. § 853(a)(3) and which shall include all property constituting or derived from any proceeds obtained, directly or indirectly, as well as any properties used, or intended to be used, in any manner or part, to facilitate the commission of controlled substances violations as well as any interest in, claims against, and property or contractual rights affording said defendants a source of influence or control over the continuing criminal enterprise, including but not limited to the property described below:

1. ONE heat sealed bag of currency seized at 14940 Longbow Drive, Anchorage, Alaska on March 24, 1993 [sic], DEA Evidence number N-112.

2. Residence located at 14940 Longbow Drive, Anchorage Alaska (Timberlux Subdivision #3, Block F, Lot 3).

3. Cabin with acreage more fully described as: T17NR5W, Section 33, Seward Prime Meridian, Alaska, Tract A, Plat 77-49, Alaska State Land Survey No. 76-182.

4. 4.99 acres of unimproved real property, T27NR4W, Section 22, Alaska Land Survey No. 77-91, Tract A (Chase Area) MATSU Borough, Alaska.

5. 12.32 acres of unimproved real property, more fully described as Inlet View Subdivision, MATSU Borough, Alaska,

a. Lot 2 Block 1
b. Lot 10 Block 1
c. Lot 11 Block 1
d. Lot 7 Block 5
e. Lot 8 Block 5
f. Lot 5 Block 6
g. Lot 6 Block 6
h. Lot 7 Block 6

6. .60 acres of unimproved real property located at Rabbit Creek Heights Block 4 Lot 6, Anchorage, Alaska.

7. Real property located at Tract B, Lot 3 #66, Sky Harbor Estates, Anchorage, Alaska.

8. Big Mountain Lodge, Igiugig, Alaska more particularly described as Lease Number 92-L-02, a portion of Lot 3, U.S. Survey 7982, Native Allotment AA-6277, located near Igiugig, Alaska, located in the Kvichak Recording District, State of Alaska, containing 14.057 acres.

If any of the properties described above as being subject to forfeiture pursuant to Title 21 United States Code, Section 853, as a result of any act or omission of the defendants —

a. cannot be located upon the exercise of due diligence;
b. has been transferred to, sold to, or deposited with a third party;
c. has been placed beyond the jurisdiction of this court;
d. has been substantially diminished in value; or
e. has been commingled with other properties that cannot be subdivided without difficulty;

it is the intent of the United States of America, pursuant to Title 21, United State [sic] Code, Section § 853(p), to seek

forfeiture of any properties of the defendants up to the value of the properties listed above as subject to forfeiture.

All pursuant to Title 21, United States Code, Section 853 and 848.

COUNT 3

THE GRAND JURY FURTHER CHARGES THAT:

On or about December 7, 1993, at approximately 7:49 PM, in the State and Federal District of Alaska,

GERALD FRANK PLUNK
AKA "FRANK"
AKA "EL FEO"

defendant herein, did knowingly and intentionally use a communication device, that is, the telephone, to facilitate drug trafficking offense to wit: conspiracy to distribute cocaine a Schedule II Controlled Substance, in violation of Title 21 U.S.C. § 846 and distribution of cocaine, in violation of title 21 U.S.C. 841(a)(1).

All in violation of Title 21 U.S.C. § 843(b).

COUNT 4

THE GRAND JURY CHARGES THAT:

On or about December 5, 1993, at approximately 11:59 AM, in the State and Federal District of Alaska,

GERALD FRANK PLUNK
AKA "FRANK"
AKA "EL FEO"

defendant herein, did knowingly and intentionally use a communication device, that is, the telephone, to facilitate drug trafficking offenses, to wit: conspiracy to distribute cocaine a Schedule II Controlled Substance, in violation of Title 21 U.S.C. § 846 and distribution of cocaine, in violation of Title 21 U.S.C. 841(a)(1).

All in violation of Title 21 U.S.C. § 843(b).

COUNT 5

THE GRAND JURY FURTHER CHARGES THAT:

On or about December 8, 1993, at approximately 3:43 PM, in the State and Federal District of Alaska,

GERALD FRANK PLUNK
AKA "FRANK"
AKA "EL FEO"

defendant herein, did knowingly and intentionally use a communication device, that is, the telephone, to facilitate drug trafficking offenses, to wit: conspiracy to distribute cocaine a Schedule II Controlled Substance, in violation of Title 21 U.S.C. § 846 and distribution of cocaine, in violation of Title 21 U.S.C. 841(a)(1).
All in violation of Title 21 U.S.C. § 843(b).

COUNT 6

THE GRAND JURY FURTHER CHARGES THAT:

On or about December 11, 1993, at approximately 4:03 PM, in the State and Federal District of Alaska,

GERALD FRANK PLUNK
AKA "FRANK"
AKA "EL FEO"

defendant herein, did knowingly and intentionally use a communication device, that is, the telephone, to facilitate drug trafficking offenses, to wit: conspiracy to distribute cocaine a Schedule II Controlled Substance, in violation of Title 21 U.S.C. §846 and the distribution of cocaine, in violation of Title 21 U.S.C. §841(a)(1);
All in violation of Title 21 U.S.C. §843(b).

COUNT 7

THE GRAND JURY FURTHER CHARGES THAT:

On or about December 15, 1993, at approximately 3:33 PM, in the State and Federal District of Alaska,

JOHN TIMOTHY PIERSON

AKA "TIM"
AKA "MR. T."

defendant herein, did knowingly and intentionally use a communication device, that is, the telephone, to facilitate drug trafficking offenses, to wit: conspiracy to distribute cocaine a Schedule II Controlled Substance, in violation of Title 21 U.S.C. § 846 and distribution of cocaine, in violation of Title 21 U.S.C. 841(a)(1).

All in violation of Title 21 U.S.C. § 843(b).

COUNT 8

THE GRAND JURY FURTHER CHARGES THAT:

On or about December 18, 1993, at approximately 1:03 PM, in the State and Federal District of Alaska,

JOHN TIMOTHY PIERSON
AKA "TIM"
AKA "MR. T."

defendant herein, did knowingly and intentionally use a communication device, that is, the telephone, to facilitate drug trafficking offenses, to wit: conspiracy to distribute cocaine a Schedule II Controlled Substance, in violation of Title 21 U.S.C. § 846 and distribution of cocaine, in violation of Title 21 U.S.C. 841(a)(1).

All in violation of Title 21 U.S.C. § 843(b).

COUNT 9

THE GRAND JURY FURTHER CHARGES THAT:

On or about June 4, 1993, in the State and Federal District of Alaska and elsewhere,

GERALD FRANK PLUNK
AKA "FRANK"
AKA "EL FEO"

defendant herein, did knowingly and intentionally distribute approximately 174 kilograms of cocaine, a Schedule II Controlled Substance, in violation of Title 21, U.S.C. § 841(a)(1).

COUNT 10

THE GRAND JURY FURTHER CHARGES THAT:

On or about August 21, 1993, in the State and Federal District of Alaska and elsewhere,

GERALD FRANK PLUNK
AKA "FRANK"
AKA "EL FEO"

defendant herein, did knowingly and intentionally distribute approximately 200 kilograms of cocaine, a Schedule II Controlled Substance, in violation of Title 21 U.S.C. § 841(a)(1).

COUNT 11

THE GRAND JURY FURTHER CHARGES THAT:

On or about December 12, 1993, in the State and Federal District of Alaska,

GERALD FRANK PLUNK
AKA "FRANK"
AKA "EL FEO"

defendant herein, did knowingly and intentionally distribute approximately 220 kilograms of cocaine, a Schedule II Controlled Substance in violation of Title 21 U.S.C. § 841(a)(1).

COUNT 12

THE GRAND JURY FURTHER CHARGES THAT:

Between on or about the Fall of 1980, until December 31, 1993,

GERALD FRANK PLUNK

defendant herein, did willfully and knowingly combine, conspire, confederate and agree with others known and unknown to the grand jury to commit an offense against the United States, that is to distribute in excess of 10 kilograms of cocaine, a Schedule II Controlled Substance. One primary objective of the organization was the receipt of kilogram

quantities of cocaine from Florida. The primary objective of the organization was to provide quantities of cocaine to local (Alaskan) drug traffickers for financial gain. All in violation of Title 21 U.S.C. § 841(a)(1) and 846.

A true bill.

/S/
PRESIDING GRAND JUROR

/s/ Karen L. Loeffler
for ROBERT C. BUNDY
UNITED STATES ATTORNEY

/s/ Suzanne C. Hayden
SUZANNE C. HAYDEN
ASSISTANT UNITED STATES ATTORNEY
ORGANIZED CRIME DRUG ENFORCEMENT
TASK FORCE

4/26/94
DATE

ROBERT C. BUNDY
UNITED STATES ATTORNEY

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FILED
Mar 23 1994
U.S. DISTRICT COURT
DISTRICT OF ALASKA
By _____ Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF ALASKA

UNITED STATES OF AMERICA.	)
	) Case No. A94-036 CR
Plaintiff,	)
	) **COUNT 1**
vs.	) **CONSPIRACY TO**
	) **DISTRIBUTE**
	) **COCAINE**
GERALD FRANK PLUNK,	) Vio. Title 21 U.S.C.
	) § 841(a)(1) and 846
Defendant.	)

INDICTMENT

THE GRANT JURY CHARGES THAT:

COUNT 1

Between on or about the Fall of 1987, until no later than April, 1991, the exact dates of which are unknown,

GERALD FRANK PLUNK

the defendant herein, did willfully and knowingly combine, conspire, confederate and agree with others known and unknown to the grand jury to commit an offense against the

United States, that is to distribute in excess of 10 kilograms of cocaine, a Schedule II Controlled Substance, in violation of Title 21 U.S.C. § 841(a)(1) and 846.

A true bill.

/s/
PRESIDING GRAND JUROR

/s/ Robert C. Bundy
ROBERT C. BUNDY
UNITED STATES ATTORNEY

/s/ Suzanne C. Hayden
SUZANNE C. HAYDEN
ASSISTANT UNITED STATES ATTORNEY

3/22/94
DATE

AFFIDAVIT OF SPECIAL AGENT ROBERT E. CAYFORD

I, Robert E. Cayford, being duly sworn, hereby depose and say as follows:

INTRODUCTION

1. I am a Special Agent with the United States Drug Enforcement Administration (DEA) and have been so employed for the past eleven (11) years. I am vested with the authority to investigate violations of federal law, including Title 21, United States Code. In the course of my employment I have attended schools regarding the financial methods utilized by drug traffickers. In addition, during my eleven (11) years with DEA, I have assisted and served as the case agent on numerous drug investigations and have assisted or prepared search warrants regarding drug investigations. Upon my oath, I state that I believe the following facts to be true based on my training and experience in regard to narcotic investigations:

2. That drug trafficking is a continuous pattern of illegal substance distribution and not just a single event;

3. That drug traffickers very often place assets in the name of others to avoid detection by government agencies, and that drug manufacturers often utilize fictitious company names in an attempt to give a legitimate appearance to the purchase of items necessary for the production of controlled dangerous substances;

4. That even though these assets are in other person's names, the drug dealers continue to use these assets and exercise dominion and control over them;

5. That drug traffickers often maintain on hand large amounts of U.S. Currency in order to maintain and finance their ongoing narcotics business;

6. That individuals involved in drug trafficking profit from the sale of controlled substances and attempt to legitimize (launder) those profits. I know that to accomplish this task, these individuals often use false and fictitious records, passports, birth certificates, accounts in foreign and domestic banks, securities, cashier's checks, money drafts, letters of credit, brokerage houses, real estate, shell corporations, and business fronts. These individuals often transfer real and personal property to third persons or purchase same in other people's names;

7. That drug traffickers maintain books, computers, records, receipts, notes, ledgers, airline tickets, money orders and other papers relating to the transportation, ordering, sale and distribution of controlled substances;

8. That the aforementioned books, computers, records, receipts, notes, ledgers, etc., are maintained where the drug traffickers have ready access to them;

9. That it is common for drug traffickers to secret contraband, proceeds of drug sales, and records of drug transactions in secure locations, within their residence, vehicles, commercial storage units, safe deposit boxes, and businesses for ready access and to conceal them from law enforcement authorities;

10. That persons involved in drug trafficking often conceal in their residences caches of drugs, large amounts of currency, financial instruments, precious metals, jewelry and other items of value and/or proceeds of drug transactions relating to obtaining, transferring, secreting or spending of large sums of money made from engaging in narcotics trafficking activities;

11. That drug traffickers commonly maintain addresses and telephone numbers in books or papers which reflect names, addresses and telephone numbers for their associates in the trafficking organization;

12. That drug traffickers take or cause to be taken photographs of them, their associates, their property, and their products;

13. That drug traffickers usually keep paraphernalia for packaging, cutting, weighing and distributing the drugs. That these paraphernalia include but, are not limited to, scales, plastic bags and cutting agents;

14. That drug traffickers frequently utilize alias names during every step of the drug trafficking operation, as well as using other individuals to carry out the means of drug trafficking;

15. I knew that in United States v. Hernandez-Escargega [sic], 886 F.2d 1560, 1567 (9th Cir. 1989) and United States v. Fannin, 817 F. 2d [sic] 1379, 1381-82 (9th Cir. 1987), the Court of Appeals held that in the case of drug traffickers, evidence is likely to be found where dealers live and a search warrant may be properly issued against a suspected drug dealer's residence despite the lack of direct evidence of criminal activity at the residence.

BACKGROUND

1. On July 9, 1992, Warren Jeff Funderburk was debriefed by DEA, Anchorage, pursuant to a plea agreement in which Funderburk and his wife, Kim, pled guilty to cocaine trafficking. Warren Jeff Funderburk identified Frank Plunk as his source of supply for kilogram quantities of cocaine between the Fall 1988 and the Spring 1990. Funderburk claimed that he made 10 to 15 one kilogram purchases from Plunk during that period of time. Funderburk was a guest of Frank Plunk at his (Frank Plunk's)" [sic] Big Mountain Lodge" near Lake Iliamna, Alaska during that time.

2. On March 18, 1994, a Source of Information (SOI) was interviewed by DEA, Anchorage. This SOI admitted to being the facilitator of cocaine transactions between Frank Plunk and Warren Jeff Funderburk. The SOI would pick up money from Funderburk and deliver it to Frank Plunk at his

(Plunk's) residence on Long Bow Drive, Anchorage, Alaska. Plunk would give the cocaine to the SOI at the time the money was delivered. The SOI would then deliver the cocaine to Funderburk at his residence.

3. On December 12, 1993, Hal Booher was arrested by DEA following the seizure of approximately 220 kilograms of cocaine from Booher's motorhome which Booher was driving in New Jersey. Booher was charged with Conspiracy and Possession with Intent to Distribute Cocaine in the Federal District of New Jersey.

4. Hal Booher agreed to cooperate with DEA following his arrest. Booher provided the following background information relating to his cocaine transporting activities:

A) About April 1993, Hal Booher was recruited by Gerald Frank Plunk to transport cocaine from Los Angeles, California or Houston, Texas to New Jersey. Plunk told Booher that he (Booher) would earn $20,000 to $30,000 per load. Plunk indicated that he already had other driver(s) transporting cocaine for him.

B) About August 1993, Gerald Frank Plunk sent Booher $17,000.00 U.S. Currency via Federal Express or United Parcel Service (UPS). The money was to be used by Booher to purchase a recreational vehicle for transporting cocaine. The money was a verbal loan from Plunk to Booher.

C) Between August 1993 and December 1993, Booher admitted that he transported seven or eight loads for Plunk. Each load was about the same size, 200-220 kilograms.

D) Hal Booher became acquainted with Gerald Frank Plunk in Alaska in about November 1983. Booher became aware that Plunk distributed cocaine in the Anchorage, Alaska area. Booher stated that Plunk has a desk top computer at his (Plunk) home on Long Bow Drive, Anchorage, Alaska and that Plunk often coordinated cocaine transportation from his home telephone.

5. On March 11, 1993, a Source of Information (SOI) was interviewed by DEA, Anchorage, about SOI's knowledge of Gerald Frank Plunk. SOI stated that Plunk supplied him/her with cocaine on an average of three times per week during 1989 and 1990. SOI obtained the cocaine on numerous occasions from Plunk at Plunk's home located at 14940 Long Bow Drive, Anchorage, Alaska.

6. Based on the preceding information and the eleven (11) years of experience I have in the field of drug investigations, I believe Gerald Frank Plunk to be conducting a commercial cocaine distribution enterprise from his residence located at 14940 Long Bow Drive, Anchorage, Alaska. I also believe that he has stored cocaine at his residence for approximately nine years and that there is evidence at the residence which will include cocaine, weighing, and packaging materials, currency and other assets and proceeds derived from the illicit trafficking of cocaine, business records showing purchase and sales and financial records showing proceeds and disposition of proceeds which are ill-gotten gains of the sale of cocaine. I believe there is evidence at the residence relating to transporting large shipments of cocaine across the United States.

Further your affiant sayeth naught.

/S/

Robert E. Cayford, Special Agent, Drug Enforcement Administration

Subscribed and Sworn to Before me this 22nd day of March 1994 at Anchorage, Alaska.

/S/

U.S. Magistrate Judge

F

Phillip Paul Weidner
Phillip Paul Weidner & Assoc., Inc.
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Attorneys for Defendant
Gerald Frank Plunk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, vs. GERALD FRANK PLUNK, Defendant.	Case No. A94-0036 Cr. (JWS) **MOTION IN LIMINE TO PROHIBIT NON-EXPERTS FROM OFFERING OPINION TESTIMONY**

COMES NOW defendant, GERALD FRANK PLUNK, by and through counsel, PHILLIP PAUL WEIDNER of Phillip Paul Weidner & Associates, Inc., P.C., and hereby moves this Court, pursuant to Fed. R. Evid. 702 and 403, to exclude any and all testimony by government "experts" purporting to explain codes and code names, and "the meaning of entries in drug ledgers and computer disks," as applied to the facts and allegations in the instant case.

ARGUMENT

I. TESTIMONY BY THE GOVERNMENT'S "EXPERTS" CONCERNING THE MEANING OF "CODES," "CODE NAMES," AND "ENTRIES IN DRUG LEDGERS AND COMPUTER DISKS" MUST BE EXCLUDED.

In determining whether expert testimony is admissible, the court must consider whether the witness is qualified as an expert, whether the proposed testimony is expert opinion based upon reliable method grounded in the methods and procedures of science, whether the proposed testimony will be "helpful" to the jury in understanding a material fact, and whether the information is more probative than prejudicial. See, e.g., Fed. R. Evid. 702 & 403; United States

v. Gutierrez, 995 F.2d 169 (9th Cir. 1993); United States v. Rincon, 984 F.2d 1003 (9th Cir.), vac., 114 S. Ct. 41 (1993) (vacated for reconsideration in light of Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786, 2795 (1993), the "junk science" case, which held that expert's inference or assertion must be derived by "scientific method" rather than mere subjective belief or unsupported speculation).

a. There must be a Scientific Basis for the Expert's Testimony.

In addition to laying a foundation for their "experts'" qualifications as experts, the government must show that the opinion testimony the experts propose to offer is based on "more than subjective belief or unsupported speculation." Daubert, 113 S. Ct. at 2795. To be relevant, evidence must have a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would have been without the evidence." Id. at 2794; Fed. R. Evid. 401. The Supreme Court has held:

> [I]n order to qualify as "scientific knowledge," an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by "good grounds," based on what is known. In short, the requirement that an expert's testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability.

Daubert, 113 S. Ct. at 2795. Thus, before a government expert offers testimony as to his or her opinion, that opinion must be shown to be reliable under the standard of Daubert.

b. The Testimony Must Assist the Trier of Fact without Usurping the Jury's Role.

There is a vast difference between offering as evidence testimony that "drug dealers sometimes communicate through codes," and offering testimony as to the meaning of the purported code words as applied to the facts of the instant case. The former is arguably information that might be known to a person with substantial prior experience with drug dealers; while the latter improperly substitutes the subjective conclusions of the "expert" for the conclusions of the jury as to the ultimate issue of fact. Fed. R. Evid. 704. For example, in United States v. Bailey, 607 F.2d 237, 240 & nn. 7 & 8 (9th Cir. 1979), the Ninth Circuit upheld the district court's allowance of DEA agent testimony "regarding the meaning and use of code words and commonly used phrases in drug transactions," while disallowing testimony as to specific alleged code words used

by the defendants in that case (i.e., the agent could testify that "one" generally meant "one ounce," but not that "Phillips screwdriver" allegedly referred to heroin, as the facts of that case suggested). See also United States v. Patterson, 819 F.2d 1495 (9th Cir. 1987) (allowing expert testimony regarding how criminal narcotics distribution organizations generally operate); United States v. Johnson, 735 F.2d 1200, 1202 (9th Cir. 1984) (testimony as to general practices of criminals in complex fraud schemes allowed).

In the instant case, the prosecution has stated its intent to have its agents testify as to "the meaning of entries in drug ledgers and computer discs seized from one of the defendants." See Government's Memorandum at p.14 (Oct. 25, 1994). Clearly, the significance of the particular ledgers and discs as to the instant case (and to the ultimate issue of the case, as the testimony, if believed, would imply guilt) is not properly the subject of "expert" opinion. Similarly, any testimony by Government agents as to the meaning of the alleged "code words" in the instant case must likewise be excluded. Finally, testimony by government agents that they recognized particular voices on tapes as belonging to one or more persons alleged to have participated in the alleged conspiracy must be subject to some sort of proof of their basis for recognition and ability to distinguish voices.

c. The Evidence is more Prejudicial than Probative.

Finally, expert testimony is subject to the requirements of Fed. R. Evid. 403, which states that evidence which is otherwise admissible must be excluded if its prejudicial nature outweighs its probative effect. See, e.g., Daubert, 113 S. Ct. at 2797-98. Careful consideration under Rule 403 is particularly necessary where the expert testimony offered is that of the officer involved in the investigation. Gutierrez, 995 F.2d 169, 172 (9th Cir. 1993).

RESPECTFULLY SUBMITTED THIS 22 day of July, 1996.

PHILLIP PAUL WEIDNER & ASSOC., INC.
Attorneys for Defendant
Gerald Frank Plunk

By: _____
Phillip Paul Weidner

This is to certify that on this 23 day of July, 1996, a true and correct copy of the foregoing was delivered by mail/hand to:

Robert C. Bundy, U.S. Atty
Suzanne C. Lovaas, Assist. U.S. Atty
U.S. Attorney's Office
222 W. 7th Ave., Rm. 253 #9
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Phillip Paul Weidner
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Attorneys for Defendant
Gerald Frank Plunk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA.	)	
	)	
Plaintiff.	)	
	)	
vs.	)	Case No. A94-0036 Cr. (JWS)
	)	
GERALD FRANK PLUNK.	)	
	)	
Defendant.	)	

DEFENDANT'S SUPPLEMENTAL PROPOSED JURY INSTRUCTION

COMES NOW defendant, GERALD FRANK PLUNK, by and through counsel, PHILLIP PAUL WEIDNER of Phillip Paul Weidner & Associates, Inc., P.C., and hereby requests that the Court give the attached supplemental instruction to the jury:

INSTRUCTION NO. _____

LESSER INCLUDED OFFENSE

You are instructed that Count 1 is a lesser included offense of Count 2, and that you may not deliberate or reach a verdict as to Count 1 until and unless you have reached a unanimous verdict of not guilty on Count 2.

Authority:

9th Cir. Pattern Instr. 313, Comment ¶ 3 ("When a lesser included offense instruction is appropriate, a defendant has the right to elect whether all or only some of the jurors must not be convinced beyond a reasonable doubt of guilt of the greater offense," citing United States v. Jackson, 726 F.2d 1466 (9th Cir. 1984)). See also United States v. Tsanas, 572 F.2d 340 (2d Cir.), cert. den'd, 98 S. Ct. 1647 (1978).

RESPECTFULLY SUBMITTED THIS 15th day of August, 1996.

PHILLIP PAUL WEIDNER & ASSOC., INC.
Attorneys for Defendant
Gerald Frank Plunk

By: Phillip Paul Weidner
Phillip Paul Weidner

This is to certify that on this 15th day of August, 1996, a true and correct copy of the foregoing was delivered by mail/ hand to:

Suzanne C. Hayden, Assist. U.S. Atty
U.S. Attorney's Office
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Gerald Frank Plunk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, vs. GERALD FRANK PLUNK, Defendant.	)	Case No. A94-0036 Cr. (JWS)

MEMORANDUM IN SUPPORT OF MANDATORY SUPPLEMENTAL PROPOSED JURY INSTRUCTION

The controlling Ninth Circuit case of United States v. Jackson, 726 F.2d 1466 (9th Cir. 1984), which is cited in the commentary to the Ninth Circuit Pattern Instruction § 3.13 (which is being requested by the defense) holds squarely that as to lesser included offenses (i.e., the Count 1 Conspiracy, which is a lesser included of the Count 2 Continuing Criminal Enterprise ("CCE") under United States v. Jeffers, 432 U.S. 137 (1977)), it is reversible error to fail to honor the defendant's election as to whether: 1) the jury must be unanimous on acquittal on the greater count (Count 2) before deliberating or returning a verdict on the lesser count (Count 1); or 2) the jury may do so after being "hung" after "reasonable efforts" to agree unanimously on the greater.

The cases that serve as a foundation for Jackson, including United States v. Tsanas, 572 F.2d 340 (2d Cir.), cert. den'd, 98 S. Ct. 1647 (1978), likewise hold squarely that this election by the defendant must be honored by the court since there are distinct advantages and disadvantages for both the prosecution and defendant to either alternative (i.e., alternative 1--

unanimous acquittal before deliberations, versus alternative 2-- unanimous acquittal or hung jury). One of the precise advantages to the defendant as to alternative 1 (which is being requested by the defendant here) which was noted by Judge Friendly in Tsanas was that a hung jury on the greater would protect the defendant from the opportunity for the jury to convict on the lesser. An additional benefit noted by Judge Friendly as to said alternative (i.e., alternative 1, herein requested) demanding a clear acquittal on the greater offense before allowing a potential acquittal or conviction on the lesser offense, protects the defendant from being retried for the greater after a successful merit appeal by the defendant from a conviction on the lesser. See Tsanas, 572 F.2d at 346 & n. 7. Given the unprecedented enthusiasm that the government has demonstrated for pursuing Mr. Plunk, this is a real and vital advantage that he and counsel have a right to insist on in this instance, since there is little question that the prosecution would seek to retry him on the Count 2 CCE count if he is convicted on the Count 1 conspiracy and obtains a reversal on appeal.

An equally compelling advantage to the defendant Plunk, in the instant case, which mandates under Jackson that his election be honored is the fact that if the jury is hung on Count 2 but convicts on Count 1, the prosecution will seek to retry the forfeiture counts irrespective of the Count 1 conviction and will seek to do so notwithstanding double jeopardy considerations. That is, quite simply, jeopardy has attached (i.e., the jury has been sworn on the specific indictment), as to the forfeitures (which involve hundreds of thousands of dollars worth of property), and which in turn are based upon the CCE count, given the form of the indictment (which seeks forfeiture solely under Count 2), and the defendant has the right to insist on a non-forfeiture verdict, that is, a CCE acquittal, before there is deliberation or verdict on the lesser included conspiracy of Count 1.

Moreover, it is crucial that the court so instruct the jury before there are any further deliberations.

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RESPECTFULLY SUBMITTED THIS 15th day of August, 1996.

PHILLIP PAUL WEIDNER & ASSOC., INC.
Attorneys for Defendant
Gerald Frank Plunk

By: Phillip Paul Weidner
Phillip Paul Weidner

This is to certify that on this 15th day of August, 1996, a true and correct copy of the foregoing was delivered by mail/hand to:

Suzanne C. Hayden, Assist. U.S. Atty
U.S. Attorney's Office
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(F)

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Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA. Plaintiff. vs. GERALD FRANK PLUNK. Defendant.	) Case No. A94-0036 CR (JWS) **AFFIDAVIT OF COUNSEL IN SUPPORT OF MOTION TO RECONSIDER DENIAL OF REQUESTED MANDATORY SUPPLEMENTAL INSTRUCTION**

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

PHILLIP PAUL WEIDNER, being first duly sworn under oath, deposes and states as follows:

1. I am an attorney licensed to practice in the State of Alaska and I am counsel for defendant Gerald Frank Plunk herein.

2. I am submitting this affidavit in support of my oral offer(s) of proof on the record on August 15, 1996, concerning the issue of ineffective assistance of counsel and/or the fact that any previous absence of a specific request for a transition instruction between the greater offense of the CCE charge in Count 2 and the lesser included defense in Count 1 was not a tactical decision, and further, was due to said ineffective assistance of counsel;

3. Although, as the Court indicated on the record, there was some discussion in chambers concerning the Count 1 conspiracy being a lesser included of the Count 2 CCE, my recollection is that said discussion was within the context of

whether said conspiracy as a lesser included of the CCE might serve as a predicate offense for same, and there was no mention or discussion of transitional instructions or in particular no mention or discussion of the defendants right to elect whether the jury must be unanimous in acquitting on the greater offense before proceeding to deliberate on the lesser offense, or whether the jury may do so after making a reasonable effort to make a unanimous decisions of the greater offense;

4. I first became aware of said transitional issue after the Court adjourned on August 14, 1996 after the discussion on the record concerning the jury asking for clarification as to differences between Count 1 and Count 12;

5. Upon becoming aware of said issue, i.e. a transitional instruction between the Count 2 CCE and the Count 1 conspiracy, as opposed to the Count 12 conspiracy, I researched said issue to the best of my ability in the late evening hours working until approximately 11:30 p.m. and first encountered the model 9th Circuit pattern instruction 3-13 at approximately 9:15 p.m. and first became aware of the fact that in Federal Court and in particular, the 9th Circuit, it is the defendants right to elect whether the jury must be unanimous on the greater before proceeding to deliberate on the lessor, or whether they may do so after reasonable attempts to reach said unanimous decision, and, further, first became aware of the cases of Tsanas, and U.S. v. Jackson;

6. Any absence of a specific request by me on behalf of the defendant of a transitional instruction prior to the jury retiring was not a tactical choice and I never discussed any such tactical considerations with Mr. Plunk (this affidavit is tendered as an offer of proof in support of said motion to reconsider and said offer is not intended as any limited or general waiver of the right to attorney/client privileges or confidentiality of attorney/client communications with the resultant expectation of privilege under U.S. v. Simmons);

7. I reluctantly acknowledge that I may have afforded ineffective assistance of counsel to Mr. Plunk in not recognizing the issue earlier and specifically requesting said election and believe that said ineffective assistance of counsel was due in part to the fact that during trial adjournment I traveled to and from Illinois for a family reunion, leaving on or about August 2, 1996, and returning on or about August 6, 1996, and having very little sleep in the interim. Part of the difficulty in obtaining sleep was the fact that as reflected partially on the record on my return from St. Louis to Anchorage my flight was delayed leaving St. Louis, was late arriving at the gate in Chicago, I missed a flight in Chicago and had to fly to Seattle and slept very little and flew in the morning to Court and went to Court with very little sleep;

8. In any event, irrespective of the ineffective assistance of counsel issue, it is my position, as documented by the record, that the requested instruction was a necessary and proper response to the jury's note and the record should reflect the fact that my initial response to the jury's note concerning requested clarification was that the judge should have asked the jury to further clarify what areas they needed clarification in, which in all likelihood would have given us further guidance as to this aspect of the differences in Count 1 and Count 12, to wit, the order of deliberations as to Count 1 verses the order of deliberation as to Count 12 in light of the defendants right to elect;

9. Further, although I have had prior experience as a criminal defense attorney, this is the first CCE case I have defended, and I never previously drafted or submitted jury instructions to a judge in connection with same, and further, I never drafted or submitted jury instructions to a judge concerning forfeiture as to same, and further, I have never previously, prior to this case, conferred with any other defense attorneys, judges, or law clerks concerning said issues.

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FURTHER AFFIANT SAYETH NAUGHT.

Phillip Paul Weidner

SUBSCRIBED AND SWORN TO before me, the undersigned, a Notary Public in and for the State of Alaska, duly commissioned as such, this 15th day of August, 1996.

Wanda Stetler
Notary Public for Alaska
My Commission Expires: 1-02-96

THIS IS TO CERTIFY THAT on the 15th day of August, 1996, a true and correct copy of the foregoing was delivered by hand/mail on:

Suzanne C. Hayden, Asst. U.S. Attorney
U.S. Department of Justice
U.S. Attorney's Office
222 W. 7th Ave. #9, Room 253
Anchorage, AK 99513-7567

Marcus Paine, Esq.
1107 W. 7th Avenue
Anchorage, AK 99501

PW

LAW OFFICES OF PHILLIP PAUL WEIDNER AND ASSOCIATES, APC

FILED

AUG 5 1996

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
By _____ Deputy

MINUTES OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA v. GERALD FRANK PLUNK

THE HONORABLE JOHN W. SEDWICK CASE NO. A94-0036 CR (JWS)

Deputy Clerk Official Recorder

Pam Richter

RECEIVED
AUG - 8 1996
Weidner & Associates

APPEARANCES: for PLAINTIFF: ----

for DEFENDANT: ----

PROCEEDINGS: **ORDER FROM CHAMBERS**

Defendant filed a motion to preclude certain testimony at docket 324. The magistrate judge has recommended that the motion be denied in a report at docket 344. No objections have been filed.

This court has carefully and independently reviewed the motion at docket 324 and finds no merit in it. This court agrees with the findings and conclusions of the magistrate judge at docket 344 and therefore adopts them. The motion at docket 324 is DENIED.

DATE: August 5, 1996

ENTERED AT JUDGE'S DIRECTION
INITIALS: prr
Deputy Clerk

(FORMS*1A*)

cc: US Attorney, ~~Pa~~ Weidner, MJ Roberts

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RECEIVED
JUL 23 1996
Weidner & Associates

FILED
JUL 23 1996
UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
By _____ Deputy

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, v. GERALD FRANK PLUNK, Defendant.	Case No. A94-036 CR (JWS) RECOMMENDATION REGARDING MOTION TO DISMISS (Document No. 324)

Defendant GERALD PLUNK has filed a pleading styled "Motion to Preclude Tainted and Unconstitutional Testimony and to Dismiss for Selective Prosecution and Violation of Due Process and Other Constitutional Rights." Docket No. 324. The government opposes the motion. Docket No. 328. For reasons stated below I recommend that the motion to dismiss be DENIED.

Plunk seeks a dismissal of his prosecution on grounds that the government has engaged in selective prosecution by prosecuting some but not all members of the alleged conspiracy and allowing some co-conspirators to obtain a lenient sentence by providing "substantial assistance" to the government in its prosecution of the defendant. Plunk argues

that this treatment denies him equal protection, due process of the law, a fair and impartial trial, and his right to effective confrontation and cross-examination of witnesses.

To challenge the government's plea bargaining with co-conspirators, Plunk must establish a prima facie discrimination by showing that others similarly situated were not prosecuted or got more favorable plea bargains and that his prosecution was based on discriminatory purpose or intent. United States v. Estrada-Plata, 57 F.2d 757 (9th Cir. 1995). Plunk offers no evidence of discriminatory intent by the government. He states that evidence of the plea agreement/negotiations with other witnesses will be filed with the court at some future time. "[To] establish a prima facie case of selective prosecution, the defendant 'must present enough evidence to demonstrate a reasonable inference of invidious discrimination'." Id. at p.761, citing United States v. Redondo-Lemos, 955 F.2d 1296, 1302 (9th Cir. 1992). Plunk has not presented evidence that the government's prosecution was brought for the purpose of or intended to deny him his Sixth Amendment right to confront witnesses.

There is no constitutional right to a plea bargain; the decision whether to offer one is a matter of prosecutorial discretion. United States v. Moody, 778 F.2d 1380, 1385-86 (9th Cir. 1985), amended 791 F.2d 707 (9th Cir. 1986). Although a prosecutor's discretion is subject to constitutional constraints, as long as the prosecutor has probable cause to believe that the accused committed the proscribed conduct, the decision whether to prosecute generally rests in the discretion of the prosecutor. United States v. Armstrong, 116 S.Ct. 1480 (1996).

Plunk presents no evidence to support his contention that others similarly situated to him were not prosecuted or were given more favorable plea bargains. Such a determination is fact specific.

Plunk has not submitted evidence tending to show the essential elements of selective prosecution, namely that the prosecution had a discriminatory effect and was motivated by a discriminatory purpose. Should the trial judge perceive a pattern of invidious enforcement during the trial the judge has authority under the court's supervisory powers to raise the matter sua sponte. United States v. Redondo-Lemos, 955 F.2d 1296, 1298 (9th Cir. 1992). (Redondo-Lemos I).

A defendant's observation that some conspirators and not others have been prosecuted for a particular drug crime is insufficient for the purposes of establishing selective prosecution without a showing that the government has not or is not prosecuting similarly situated drug offenders based on an impermissible motive including discriminatory purpose or intent. United States v. Gutierrez, 990 F.2d 472, 475 (9th Cir. 1993). Discriminatory purpose implies more than intent as awareness of consequences. It implies that in making the decision a particular course was chosen in part "because of" not merely despite its adverse effect on an identifiable group. Id. The defendant bears the burden of showing that others similarly situated have not been prosecuted and that the prosecution is based on an impermissible motive. Id. Plunk has presented no evidence to permit the court to isolate a factor allegedly subject to an impermissible discrimination so that the similarly situated class is analogous to

the defendant without the one impermissible factor. See United States v. Aguilar, 883 F.2d 662, 707 (9th Cir. 1989). An identifiable group is typically a race, religion or group of persons exercising a constitutional right. Wayte v. United States, 470 U.S. 598, 608 (19 85). "No equal protection violation can exist in the absence of a similarly situated control group, for there would be no measuring rod by which to determine if an inequality exists." Aguilar, 883 F.2d 662, 706 (9th Cir. 1989). The court explained that discrimination does not exist in a vacuum but must be found in an unequal treatment of people in similar circumstances. Assuming arguendo that a similarly situated class might consist of all of Plunk's co-conspirators, he has offered no evidence that the government is declining to prosecute similarly situated drug offenders.

The defendant faces the practical problem of establishing discriminatory effect and purpose when the information necessary to prove such a claim often is in the sole possession of the prosecutor. To obtain discovery on a claim of selective prosecution the defendant "must present specific facts, not mere allegations, which establish a colorable basis for the existence of both discriminatory application of the law and discriminatory intent on the part of the government actors." The standard for determining whether an adequate showing has been made by defendant seeking discovery in connection with the charge of selective prosection is the need to present some evidence tending to show the existence of the essential elements of the defense. 116 S.Ct. at 1488.

Plunk has made no prima facie showing of outrageous government conduct vis-a-vis the government targeting him for prosecution without reasoned grounds. Plunk has not identified government conduct which is so outrageous that due process principles would absolutely bar his conviction. To constitute outrageous government conduct the government's action must violate the "universal sense of justice." United States v. Montoya, 45 F.3d 1286, 1300 (9th Cir. 1995). Prosecution is barred for a violation of due process only when the government's conduct is so grossly shocking and so outrageous as to violate the universal sense of justice. United States v. Ramirez, 710 F.2d 535, 539 (9th Cir. 1983). This is an extremely high standard. United States v. Smith, 924 F.2d 889, 897 (9th Cir. 1991). "[The] limitations of the Due Process Clause of the Fifth Amendment come into play only where the government activity in question violates some protected right of the defendant." Hampton v. United States, 425 U.S. 484, 490 (1976). In accord, United States v. Payner, 447 U.S. 727, 737 n.9 (1980). Without factual support Plunk accuses the government of "threatening" potential government witnesses with incarceration unless they testify for the government. The use of a highly charged word such as "threat", implies that the government uses coercion to cause witnesses to testify against the defendant in order to avoid their own injury or punishment. Witnesses have many varied reasons for testifying at trial. Plea bargaining with co-defendants or co-conspirators does not constitute coercion. The defendant is entitled to cross-examine trial witnesses concerning their possible bias or motive for testifying. There is no constitutional guarantee that the cross-examination will be effective.

Courts have generally recognized that in order to apprehend persons engaged in serious crime, government agents may lawfully use methods "that are neither appealing nor moral if judged by abstract norms of decency." United States v. Bogart, 783 F.2d 1428 (9th Cir. 1986). Thus, the government may pay informants or invoke a sentencing guideline seeking a downward departure from the guidelines for a defendant who has provided a assistance subsistence to authorities. See U.S.S.G. § 5K1.1. Plunk does not suggest any government conduct that may have had a role in inducing him to become involved in the crime.

The government's discretion in filing a "substantial assistance" departure motion does not violate due process. United States v. LaGuardia, 902 F.2d 1010 (1st Cir. 1990). The use of guideline sentencing does not deprive a defendant of the constitutional right to due process. Id; United States v. Avarza, 874 F.2d 647 (9th Cir. 1989). (No constitutional right to the availability substantial assistance provision). United States v. Huerta 878 F.2d 89 (2nd Cir. 1989). Plunk has made no showing in his challenge to the evaluation of the assistance of others that the prosecutor has exercised bad faith.

WHEREFORE, the defendant's motion to preclude testimony or to dismiss his prosecution should be DENIED. IT IS SO RECOMMENDED.

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//

//

DATED this 23rd day of July, 1996, at Anchorage, Alaska.

JOHN D. ROBERTS
United States Magistrate Judge

Pursuant to Local Magistrate Rule 12(C), a party seeking to object to this proposed finding and recommendation shall file written objections with the Clerk of Court no later than the close of business on 7-24-96. The failure to object to a magistrate judge's findings of fact may be treated as a procedural default and waiver of the right to contest those findings on appeal. McCall v. Andrus, 628 F.2d 1185, 1187-1189 (9th Cir.), cert. denied, 450 U.S. 996 (1981). Objections and responses shall not exceed **five (5) pages** in length, and shall not merely reargue positions presented in motion papers. Rather, objections and responses shall specifically designate the findings or recommendations objected to, the basis of the objection, and the points and authorities in support. Response(s) to the objections shall be filed on or before NOON 7-25-96 The parties shall otherwise comply with provisions of Local Rule 12(C).

Reports and recommendations are not appealable orders. Any notice of appeal pursuant to Fed.R.App.P. 4(a)(1) should not be filed until entry of the district court's judgment. See Hilliard v. Kincheloe, 796 F.2d 308 (9th Cir. 1986).

cc: USA, P. Weidner, Judge Sedwick
7/23/96 f/c notice to CMSI

A94-056 CR (JWS)
RR Re Mtn to Dismiss #324
cr194\plmdr.26

AO 72A
(Rev. 8/82)

Phillip Paul Weidner
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Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, vs. GERALD FRANK PLUNK, et al., Defendants.	Case No. A94-0036 CR (JWS)

MOTION TO PRECLUDE TAINTED AND UNCONSTITUTIONAL TESTIMONY AND TO DISMISS FOR SELECTIVE PROSECUTION AND VIOLATION OF DUE PROCESS AND OTHER CONSTITUTIONAL RIGHTS

COMES NOW defendant GERALD FRANK PLUNK, by and through counsel, Phillip Paul Weidner of Phillip Paul Weidner & Associates, Inc., and hereby moves this Court pursuant to his rights under the U.S. and Alaska Constitutions, to due process and equal protection, to confrontation and cross-examination, to a fair and impartial jury trial, to effective assistance of counsel, and to subpoena power and to call witnesses, and for the following relief:

1. To dismiss prosecution in this matter on the grounds that the prosecution is engaging in selective prosecution and violating the above referenced rights, to wit, prosecuting certain alleged members of the conspiracy while foregoing prosecution of others, including, but not limited to the fact that numerous

unindicted or indicted co-conspirators have either obtained lenient sentences or avoided prosecution by offering testimony against Mr. Plunk;

2. To preclude such pre-offered testimony on the grounds that it is inherently unconstitutional and a perversion of the truth finding process to allow the government to threaten witnesses with potential incarceration and punishment unless they testify for the government.

3. In particular, it is the position of the defendant that any provisions under the "Guidelines/Sentencing Act" and/or minimum sentencing provisions under the U.S. Code that allow the sole discretion in the government to file a motion for "substantial assistance" to allow the defendants to avoid such minimum punishments and guidelines, is an inherent perversion and unconstitutional impact on the truth finding process.

Evidence of the plea agreements/negotiations, testimonial agreements, that have been made with said witnesses and support this motion, will be filed with the Court upon disclosure of same by the government pursuant to a discovery request herewith.

This includes, but is not limited to, seeking such relief as the witnesses David Nova, Barry Tendler, Ray Flemming, Tim Robertson, Carlos Serrato, Kent Taylor, Fred Hall, and Hal Booher.

RESPECTFULLY submitted this 8th day of July, 1996.

WEIDNER & ASSOCIATES, INC.
Attorneys for Defendant Plunk

By: _____
Phillip Paul Weidner

THIS IS TO CERTIFY THAT on the
8th day of July, 1996, a true
and correct copy of the foregoing
was delivered by hand/mail on:

Suzanne C. Hayden, Asst. U.S. Attorney
U.S. Department of Justice
U.S. Attorney's Office
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Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. A94-0036 CR (JWS)
	)	
GERALD FRANK PLUNK, et al.,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM IN SUPPORT OF MOTION TO PRECLUDE TAINTED AND UNCONSTITUTIONAL TESTIMONY AND TO DISMISS FOR SELECTIVE PROSECUTION AND VIOLATION OF DUE PROCESS AND OTHER CONSTITUTIONAL RIGHTS

For literally centuries, one of the cornerstones of our justice system as it has come to us from Roman, Greek, German, and English Law, is a "search for the truth".

The cornerstones of same have been the subpoena power, the oath, and cross-examination and confrontation via effective counsel. Unfortunately, over the past decades an insidious practice which first evolved informally, has now been codified, by which the prosecution has largely unlimited power to suborn perjury by subjecting potential witnesses to the threat of criminal charges and in many instances, draconian sentences, through the guidelines, or through mandatory minimum sentences, with the sole "escape route" being to provide testimony favorable to government against other citizens.

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That is, under the U.S. Code including 18 U.S.C. 3553(c)4(f), and 28 U.S.C. 994(n), the only way to avoid such minimum sentences or guidelines, is for a so called "downward departure" motion to be filed with the government for "substantial assistance".

When faced with such threats, the average citizen may well, and often is, quite frankly, tempted to lie to escape such punishment.

This violates equal protection and due process, and further, the right to a fair and impartial jury trial, and further, to the right of effective confrontation and cross-examination and to effective assistance of counsel.

Quite simply, when citizens are faced with one or two choices, i.e. they lie and "sing the government's song", or tell the truth and go to jail for their own sins, in all likelihood the overwhelming pressure (and end result) will be to lie.

Note further that there is no reason, on a constitutional basis to allow certain witnesses, i.e. the government witnesses, to be subject to more draconian penalties for testimony that displeases the government than other witnesses. That is all witnesses should simply be subject to the requirement of an oath and the possibility of prosecution for perjury and the government should not be allowed to use extra incentives, such as threats of additional incarceration, in order to induce testimony.

To more properly frame the issue the Court might consider the following question: "Would the Court allow the government to offer each of the witnesses against Mr. Plunk $100 million if they testify in a fashion that pleases the government?"

Obviously the answer is no.

The next question would be, "Is it worth $100 million to escape a life sentence?"

Obviously the answer is yes.

Accordingly, it should be readily apparent that allowing the government to force witnesses to testify in a matter consistent with the government theory of the case through the threat of criminal incarceration is unconstitutional. Moreover, in the instant case, the evidence reflects that numerous admitted dealers in cocaine, including David Nova, Barry Tendler, Ray Flemming, Fred Hall, Hal Booher, Tim Robertson, Carlos Serrato, and Kent Taylor, have either escaped serious punishment or are escaping serious punishment due to the government's decision to focus on Mr. Pearson and Mr. Plink.

This constitutes "selective prosecution", a perversion of the truth finding process and is unconstitutional.

RESPECTFULLY submitted this 8th day of July, 1996.

WEIDNER & ASSOCIATES, INC.
Attorneys for Defendant Plunk

By: _____
Phillip Paul Weidner

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THIS IS TO CERTIFY THAT on the
8th day of July, 1996, a true
and correct copy of the foregoing
was delivered by hand/mail on:

Suzanne C. Hayden, Asst. U.S. Attorney
U.S. Department of Justice
U.S. Attorney's Office
222 W. 7th Ave. #9, Room 253
Anchorage, AK 99513-7567

Marcus Paine, Esq.
1107 W. 7th Ave.
Anchorage, AK 99501

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

United States Constitution:

Fourth Amendment. Searches and seizures. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment. Rights of accused in criminal proceedings; due process; eminent domain. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment. Right to Speedy Trial, witnesses, etc. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Fourteenth Amendment. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Appointment of Representation; Disqualification of Officers; Public Debt; Enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for

payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Federal Statutes:

18 U.S.C. § 201(c)(2). Bribery of public officials and witnesses

(c) Whoever--

* * *

(2) directly or indirectly, gives, offers or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of such person's absence therefrom;

19 U.S.C. § 1602. Seizure; report to customs officer

It shall be the duty of any officer, agent, or other person authorized by law to make seizures of merchandise or baggage subject to seizure for violation of the customs laws, to report every such seizure immediately to the appropriate customs officer for the district in which such violation occurred, and to turn over and deliver to such customs officer any vessel, vehicle, aircraft, merchandise, or baggage seized by him, and to report immediately to such customs officer every violation of the customs laws.

19 U.S.C. § 1603. Seizure; warrants and reports

(a) Process for search warrant

Any property which is subject to forfeiture to the United States for violation of the customs laws and which is not subject to search and seizure in accordance with the provisions of section 1595 of this title, may be seized by the appropriate officer or person upon process issued in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure. This authority is in addition to any seizure authority otherwise provided by law.

(b) Customs officer's reports

Whenever a seizure of merchandise for violation of the customs laws is made, or a violation of the customs laws is discovered, and legal proceedings by the United States attorney in connection with such seizure or discovery are required, it shall be the duty of the appropriate customs officer to report promptly such seizure or violation to the United States attorney for the district in which such violation has occurred, or in which such seizure was made, and to include in such report a statement of all the facts and circumstances of the case within his knowledge, with the names of the witnesses and a citation to the statute or statutes believed to have been violated, and on which reliance may be had for forfeiture or conviction.

19 U.S.C. § 1604. Seizure; prosecution

It shall be the duty of the Attorney General of the United States immediately to inquire into the facts of cases reported to him by customs officers and the laws applicable thereto, and if it appears probable that any fine, penalty, or forfeiture has been incurred by reason of such violation, for the recovery of which the institution of proceedings in the United States district court or the Court of International Trade

is necessary, forthwith to cause the proper proceedings to be commenced and prosecuted, without delay, for the recovery of such fine, penalty, or forfeiture in such case provided, unless upon inquiry and examination, the Attorney General decides that such proceedings can not probably be sustained or that the ends of public justice do not require that they should be instituted or prosecuted, in which case he shall report the facts to the Secretary of the Treasury for his direction in the premises.

19 U.S.C. § 1605. Seizure; custody; storage

All vessels, vehicles, aircraft, merchandise, and baggage seized under the provisions of the customs laws, or laws relating to the navigation, registering, enrolling or licensing, or entry or clearance, of vessels, unless otherwise provided by law, shall be placed and remain in the custody of the appropriate customs officer for the district in which the seizure was made to await disposition according to law.

Pending such disposition, the property shall be stored in such place as, in the customs officer's opinion, is most convenient and appropriate with due regard to the expense involved, whether or not the place of storage is within the judicial district or the customs collection district in which the property was seized; and storage of the property outside the judicial district or customs collection district in which it was seized shall in no way affect the jurisdiction of the court which would otherwise have jurisdiction over such property.

19 U.S.C. § 1606. Seizure; appraisement

The appropriate customs officer shall determine the domestic value, at the time and place of appraisement, of any vessel, vehicle, aircraft, merchandise, or baggage seized under the customs laws.

19 U.S.C. § 1607. Seizure; value $500,000 or less, prohibited articles, transporting conveyances

(a) Notice of seizure

If--

(1) the value of such seized vessel, vehicle, aircraft, merchandise, or baggage does not exceed $500,000;

(2) such seized merchandise is merchandise the importation of which is prohibited;

(3) such seized vessel, vehicle, or aircraft was used to import, export, transport, or store any controlled substance or listed chemical; or

(4) such seized merchandise is any monetary instrument within the meaning of section 5312(a)(3) of Title 31;

the appropriate customs officer shall cause a notice of the seizure of such articles and the intention to forfeit and sell or otherwise dispose of the same according to law to be published for at least three successive weeks in such manner as the Secretary of the Treasury may direct. Written notice of seizure together with information on the applicable procedures shall be sent to each party who appears to have an interest in the seized article.

(b) "Controlled substance" defined

As used in this section, the terms "controlled substance" and "listed chemical" have the meaning given such terms in section 802 of Title 21.

(c) Report to Congress

The Commissioner of Customs shall submit to the Congress, by no later than February 1 of each fiscal year, a report on the total dollar value of uncontested seizures of monetary instruments having a value of over $100,000 which, or the proceeds of which, have not been deposited into the Customs Forfeiture Fund under section 1613b of this title within 120 days of seizure, as of the end of the previous fiscal year.

19 U.S.C. § 1608. Seizure; claims; judicial condemnation

Any person claiming such vessel, vehicle, aircraft, merchandise, or baggage may at any time within twenty days from the date of the first publication of the notice of seizure file with the appropriate customs officer a claim stating his interest therein. Upon the filing of such claim, and the giving of a bond to the United States in the penal sum of $5,000 or 10 percent of the value of the claimed property, whichever is lower, but not less than $250, with sureties to be approved by such customs officer, conditioned that in case of condemnation of the articles so claimed the obligor shall pay all the costs and expenses of the proceedings to obtain such condemnation, such customs officer shall transmit such claim and bond, with a duplicate list and description of the articles seized, to the United States attorney for the district in which seizure was made, who shall proceed to a condemnation of the merchandise or other property in the manner prescribed by law.

19 U.S.C. § 1609. Seizure; summary forfeiture and sale

(a) In general. If no such claim is filed or bond given within the twenty days hereinbefore specified, the appropriate customs officer shall declare the vessel, vehicle, aircraft, merchandise, or baggage forfeited, and shall sell the same at public auction in the same manner as merchandise abandoned to the United States is sold or otherwise dispose of the same according to law, and shall deposit the proceeds of sale, after deducting the expenses described in section 613 [19 USCS § 1613], into the Customs Forfeiture Fund.

(b) Effect. A declaration of forfeiture under this section shall have the same force and effect as a final decree and order of forfeiture in a judicial forfeiture proceeding in a district court of the United States. Title shall be deemed to vest in the United States free and clear of any liens or encumbrances (except for first preferred ship mortgages pursuant to

subsection O of section 30 of the Ship Mortgage Act, 1920 (46 U.S.C. App. 961) or any corresponding revision, consolidation, and enactment of such subsection in title 46, United States Code) from the date of the act for which the forfeiture was incurred. Officials of the various States, insular possessions, territories, and commonwealths of the United States shall, upon application of the appropriate customs officer accompanied by a certified copy of the declaration of forfeiture, remove any recorded liens or encumbrances which apply to such property and issue or reissue the necessary certificates of title, registration certificates, or similar documents to the United States or to any transferee of the United States.

21 U.S.C. § 841. Prohibited acts A

Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Penalties

(b) Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

* * *

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. ... Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving—

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives or ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, is derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

* * *

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendants is an individual or $5,000,000 if the defendant is other than an individual, or both. ... Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

* * *

21 U.S.C. § 843. Prohibited acts C

Unlawful acts

* * *

Communication facility

(b) It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter. Each separate use of a communication facility shall be a separate offense under this subsection. For purposes of this subsection, the term "communication facility" means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication.

* * *

Penalties

(d) Any person who violates this section shall be sentenced to a term of imprisonment of not more than 4 years, a fine of not more than $30,000, or both; except that if any person commits such a violation after one or more prior convictions of him for violation of this section, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 8 years, a fine of not more than $60,000, or both.

* * *

21 U.S.C. § 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C. § 848. Continuing criminal enterprise

Penalties; forfeitures

(a) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this title; except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 30 years and which may be up to life imprisonment, to a fine not to exceed the greater of twice the amount authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this title.

Conditions for life imprisonment for engaging in continuing criminal enterprise

(b) Any person who engages in a continuing criminal enterprise shall be imprisoned for life and fined in accordance with subsection (a) of this section, if—

(1) such person is the principal administrator, organizer, or leader of the enterprise or is one of several such principal administrators, organizers, or leaders; and

(2)(A) the violation referred to in subsection (c)(1) of this section involved at least 300 times the quantity of a substance described in subsection 841(b)(1)(B) of this title, or

(B) the enterprise, or any other enterprise in which the defendant was the principal or one of several principal administrators, organizers, or leaders, received $10 million dollars in gross receipts during any twelve-month period of its existence for the manufacture, importation, or distribution of a substance described in section 841(b)(1)(B) of this title.

Continuing criminal enterprise defined

(c) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

Suspension of sentence and probation prohibited

(d) In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and the Act of July 15, 1932 (D.C.Code, secs. 24-203 to 24-207), shall not apply.

* * *

21 U.S.C. § 853. Criminal forfeitures

(a) Property subject to criminal forfeiture

Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law--

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II of this chapter, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Meaning of term "property"

Property subject to criminal forfeiture under this section includes--

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) Third party transfers

All right, title, and interest in property described in subsection (a) of this section vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) of this section that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d) Rebuttable presumption

There is a rebuttable presumption at trial that any property of a person convicted of a felony under this subchapter or subchapter II of this chapter is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that--

(1) such property was acquired by such person during the period of the violation of this subchapter or subchapter II of this chapter or within a reasonable time after such period; and

(2) there was no likely source for such property other than the violation of this subchapter or subchapter II of this chapter.

(e) Protective orders

(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) of this section for forfeiture under this section--

(A) upon the filing of an indictment or information charging a violation of this subchapter or subchapter II of this

chapter for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that--

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and

information that would be inadmissible under the Federal Rules of Evidence.

(f) Warrant of seizure

The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant. If the court determines that there is probable cause to believe that the property to be seized would, in the event of conviction, be subject to forfeiture and that an order under subsection (e) of this section may not be sufficient to assure the availability of the property for forfeiture, the court shall issue a warrant authorizing the seizure of such property.

(g) Execution

Upon entry of an order of forfeiture under this section, the court shall authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to or derived from property ordered forfeited under this section may be used to offset ordinary and necessary expenses to the property which are required by law, or which are necessary to protect the interests of the United States or third parties.

(h) Disposition of property

Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially

feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with him or on his behalf be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with him or on his behalf, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm, or loss to him.

(i) Authority of the Attorney General

With respect to property ordered forfeited under this section, the Attorney General is authorized to--

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this subchapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this section;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States, in accordance with the provisions of section 881(e) of this title, of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(j) Applicability of civil forfeiture provisions

Except to the extent that they are inconsistent with the provisions of this section, the provisions of section 881(d) of this title shall apply to a criminal forfeiture under this section.

(k) Bar on intervention

Except as provided in subsection (n) of this section, no party claiming an interest in property subject to forfeiture under this section may--

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(l) Jurisdiction to enter orders

The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(m) Depositions

In order to facilitate the identification and location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States, the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(n) Third party interests

(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that--

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(o) Construction

The provisions of this section shall be liberally construed to effectuate its remedial purposes.

(p) Forfeiture of substitute property

If any of the property described in subsection (a) of this section, as a result of any act or omission of the defendant--

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

(q) Restitution for cleanup of clandestine sites

The court, when sentencing a defendant convicted of an offense under this subchapter or subchapter II of this chapter involving the manufacture of methamphetamine, may--

(1) order restitution as provided in sections 3612 and 3664 of Title 18;

(2) order the defendant to reimburse the United States for the costs incurred by the United States for the cleanup associated with the manufacture of methamphetamine by the defendant; and

(3) order restitution to any person injured as a result of the offense as provided in section 3663 of Title 18.

21 U.S.C. § 881. Forfeitures

(a) **Subject property.** The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this title.

(2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this title.

(3) All property which is used, or intended for use, as a container for property described in paragraph (1), (2), or (9).

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2), or (9), except that—

(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this title or title III;

(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State; and

(C) no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent or willful blindness of the owner.

(5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this title.

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this title, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this title, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(8) All controlled substances which have been possessed in violation of this title.

(9) All listed chemicals, all drug manufacturing equipment, all tableting machines, all encapsulating machines, and all gelatin capsules, which have been imported, exported, manufactured, possessed, distributed, or intended to be distributed, imported, or exported, in violation of a felony provision of this title or title III.

(10) Any drug paraphernalia (as defined in section 1822 of the Mail Order Drug Paraphernalia Control Act [21 USCS § 857]).

(11) Any firearm (as defined in section 921 of title 18, United States Code) used or intended to be used to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2) and any proceeds traceable to such property.

(b) Seizure pursuant to Supplemental Rules of Certain Admiralty and Maritime Claims. Any property subject to civil forfeiture to the United States under this title may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules of Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property, except that seizure without such process may be made when—

(1) the seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;

(2) the property subject to seizure has been the subject of a prior judgment in favor of the United States in a criminal injunction or forfeiture proceeding under this title;

(3) the Attorney General has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(4) the Attorney General has probable cause to believe that the property is subject to civil forfeiture under this title.

In the event of seizure pursuant to paragraph (3) or (4) of this subsection, proceedings under subsection (d) of this section shall be instituted promptly.

The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure.

(c) Custody of Attorney General. Property taken or detained under this section shall not be repleviable, but shall be deemed to be in the custody of the Attorney General, subject only to the orders and decrees of the court or the official having jurisdiction thereof. Whenever property is seized under any of the provisions of this title, the Attorney General may—

(1) place the property under seal;

(2) remove the property to a place designated by him; or

(3) require that the General Services Administration take custody of the property and remove it, if practicable, to an appropriate location for disposition in accordance with law.

(d) Other laws and proceedings applicable. The provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws; the disposition of such property or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under any of the provisions of this title, insofar as applicable and not inconsistent with the provisions hereof; except that such duties as are imposed upon the customs

officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this title by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, except to the extent that such duties arise from seizures and forfeitures effected by any customs officer.

(e) Disposition of forfeited property. (1) Whenever property is civilly or criminally forfeited under this title the Attorney General may—

(A) retain the property for official use or, in the manner provided with respect to transfers under section 616 of the Tariff Act of 1930, transfer the property to any Federal agency or to any State or local law enforcement agency which participated directly in the seizure or forfeiture of the property;

(B) except as provided in paragraph (4), sell, by public sale or any other commercially feasible means, any forfeited property which is not required to be destroyed by law and which is not harmful to the public;

(C) require that the General Services Administration take custody of the property and dispose of it in accordance with law;

(D) forward it to the Bureau of Narcotics and Dangerous Drugs for disposition (including delivery for medical or scientific use to any Federal or State agency under regulations of the Attorney General); or

(E) transfer the forfeited personal property or the proceeds of the sale of any forfeited personal or real property to any foreign country which participated directly or indirectly in the seizure or forfeiture of the property, if such a transfer—

(i) has been agreed to by the Secretary of State;

(ii) is authorized in an international agreement between the United States and the foreign country; and

(iii) is made to country which, if applicable, has been certified under section 481(h) of the Foreign Assistance Act of 1961.

* * *

(h) Property title, etc. vested in United States. All right, title, and interest in property described in subsection (a) shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

(i) Stay of civil proceeding. The filing of an indictment or information alleging a violation of this title or title III, or a violation of State or local law that could have been charged under this title or title III, which is also related to civil forfeiture proceeding under this section shall, upon motion of the United States and for good cause shown, stay the civil forfeiture proceeding.

(j) Venue. In addition to the venue provided for in section 1395 of title 28, United States Code, or any other provision of law, in the case of property of a defendant charged with a violation that is the basis for forfeiture of the property under this section, a proceeding for forfeiture under this section may be brought in the judicial district in which the defendant owning such property is found or in the judicial district in which the criminal prosecution is brought.

[(k)](l) Functions. The functions of the Attorney General under this section shall be carried out by the Postal Service pursuant to such agreement as may be entered into between the Attorney General and the Postal Service.

Supreme Court Rule 11. Certiorari to a United States Court of Appeals Before Judgment

A petition for writ of certiorari to review a case pending in a United States court of appeals, before judgment is entered in that court, will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court. See 28 U.S.C. § 2101(e).

Supreme Court Rule 13. Review on Certiorari: Time for Petitioning

1. Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment. A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review.

2. The Clerk will not file any petition for a writ of certiorari that is jurisdictionally out of time. See, *e.g.*, 28 U.S.C. § 2101(c).

3. The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice). But if a petition for rehearing is timely filed in the lower court by any party, the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from he date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment. A suggestion made to a United States court of appeals for a rehearing en banc is not a petition for rehearing within the meaning of this Rule unless so treated by the United States court of appeals.

4. A cross-petition for a writ of certiorari is timely when it is filed with the Clerk as provided in paragraphs 1, 3, and 5 of this Rule, or in Rule 12.5. However, a conditional cross-petition (which except for Rule 12.5 would be untimely) will not be granted unless another party's timely petition for a writ of certiorari is granted.

5. For good cause, a Justice may extend the time to file a petition for a writ of certiorari for a period not exceeding 60 days. An application to extend the time to file shall set out the basis for jurisdiction in this Court, identify the judgment sought to be reviewed include a copy of the opinion and any order respecting rehearing, and set out specific reasons why an extension of time is justified. The application must be received by the Clerk at least 10 days before the date the petition is due, except in extraordinary circumstances. For the time and manner of presenting the application, see Rules 21, 22, 30, and 33.2. An application to extend the time to file a petition for a writ of certiorari is not favored.

Federal Rule of Criminal Procedure 30. Instructions

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to all parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court may instruct the jury before or after the arguments are completed or at both times. No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

Federal Rule of Evidence 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by

knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

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Federal Rule of Evidence 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Federal Rule of Evidence 704. Opinion on Ultimate Issue

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether he defendant did not did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.